TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 67

ABRAHAM BRAUNFELD, ET AL., APPELLANTS,

ALBERT S. BROWN, COMMISSIONER OF POLICE OF THE CITY OF PHILADELPHIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED APRIL 8, 1960
PROBABLE JURISDICTION NOTED MAY 23, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 67

ABRAHAM BRAUNFELD, ET AL., APPELLANTS,

vs

ALBERT N. BROWN, COMMISSIONER OF POLICE OF THE CITY OF PHILADELPHIA, ET AL.

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 21, 1960

[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 26945

ABRAHAM BRAUNFELD
327 South Street
Philadelphia, Pennsylvania

ISAAC FRIEDMAN
759 South 4th Street
Philadelphia, Pennsylvania

ALTER DIAMENT
763 South 4th Street
Philadelphia, Pennsylvania

S. DAVID FRIEDMAN
2247 E. Williams Avenue
Philadelphia, Pennsylvania
and
JOSEPH R. FRIEDMAN
2247 E. Williams Avenue
Philadelphia, Pennsylvania

vs.

THOMAS J. GIBBONS
City Hall
Philadelphia, Pennsylvania
and
VICTOR H. BLANC
City Hall
Philadelphia, Pennsylvania

COMPLAINT—Filed September 4, 1959

I. Statement as to Jurisdiction

1. This is a civil action brought by the plaintiffs for a preliminary and permanent injunction to prevent the depri-

vation, under color of Pennsylvania law, of certain rights, privileges and immunities secured to the plaintiffs by the Constitution of the United States, as hereinafter more fully set forth. The suit also seeks a judgment declaring the aforesaid Pennsylvania law unconstitutional.

2. The suit seeks the convening of a three-judge District Court pursuant to Section 2284 of the Judicial Code. Jurisdiction is conferred upon this Court pursuant to 28 U.S. Code, Section 1343.

3. The defendants reside within the Eastern District of Pennsylvania, which is therefore the proper venue of this action by virtue of 28 U.S. Code, Section 1391(b).

[fol. 3] 4. Plaintiffs all reside in Philadelphia, Pennsylvania, at the addresses appearing in the caption hereof.

5. Each of the aforesaid plaintiffs is the owner and operator of a store within the City of Philadelphia which sells at retail certain goods, specifically: Abraham Braunfeld owns and operates a retail store at 327 South Street at which he sells clothing and wearing apparel for children; plaintiff Isaac Friedmann owns and operates a retail store at 759 South 4th Street at which he sells home furnishings, to wit, draperies and slipcovers; Alter Diament owns and operates a retail store at 763 South 4th Street at which he sells home furnishings, to wit, draperies and slipcovers; S. David Friedman and Joseph R. Friedman own and operate a retail store at 2247 E. Williams Avenue at which they sell wearing apparel, to wit, shoes.

6. The defendant Thomas J. Gibbons, is the Commissioner of Police of the City of Philadelphia, and the defendant Victor H. Blanc is the District Attorney of the City of Philadelphia. The defendants have the responsibility for the enforcement within the City of Philadelphia of the Penal Code of the Commonwealth of Pennsylvania, including Act No. 212 of August 10, 1959, P.L. ——, —— P.S. ——.

II. Statute Involved

7. This suit is brought to declare the unconstitutionality of and enjoin the enforcement of Act No. 212 of August

10, 1959, P.L. ——, —— P.S. ——; which, by its terms, inter alia, forbids the sale on Sunday of the aforementioned goods sold by the plaintiffs. A copy of the said statute is hereunto annexed and marked Exhibit "A".

III. Factual Allegations

8. Each of the plaintiffs herein is an observant and orthodox member and adherent of the Jewish faith. The laws of said faith, particularly the Fourth Commandment of the Decalogue, require a total abstention from business and all manner of work from nightfall Friday until nightfall Saturday each week; this period constituting the Sabbath of the Jewish religion.

9. Each of the plaintiffs herein always has abstained, [fol. 4] and at the present time continues to abstain from business and all manner of work on the said Jewish Sabbath and keeps his store regularly closed during that period.

10. The defendants have announced that they will enforce said statute against all persons keeping their places of business open on Sunday. The plaintiffs herein therefore are immediately faced with the threat of a prosecution by the defendants for violation of the said statute should they keep their places of business open on Sunday.

11. The plaintiffs have heretofore kept their places of business open on Sunday and intend to continue to do so, thereby subjecting themselves to prosecution under the said statute unless such prosecution is enjoined by this Court and the statute declared unconstitutional.

12. Each of the plaintiffs does a substantial amount of business on Sundays, and their ability to earn a livelihood will be greatly impaired by closing their business establishments on Sundays.

First Count

13. The aforesaid Pennsylvania statute, Act No. 212 of August 10, 1959, P.L. ——, —— P.S. ——, and the enforcement thereof as announced and threatened by the defendants, are in violation of the First and Fourteenth Amend-

ments to the United States Constitution in that the said statute constitutes a law respecting an establishment of religion and are unconstitutional as against the plaintiffs herein.

Second Count

14. The said statute, Act No. 212 of August 10, 1959, P.L. ——, —— P.S. ——, and the enforcement thereof as announced and threatened by the defendants are in violation of the First and Fourteenth Amendments to the United States Constitution in that the said statute constitutes a law prohibiting the free exercise of religion, and are unconstitutional against the plaintiffs herein.

[fol. 5] Third Count

15. The specification of the goods that are forbidden for sale on Sunday in the said statute and the exclusion of all other goods is completely irrational and arbitrary and bear no rational relationship to any legislative objective within the constitutional competence of the Commonwealth of Pennsylvania and the said statute therefore is unconstitutional as against the plaintiffs herein, in that it denies to them the equal protection of the law and deprives them of their property without due process in violation of the Fourteenth Amendment to the United States Constitution.

Irreparable Injury

16. If the said statute is enforced against the plaintiffs as heretofore set forth, the plaintiffs will suffer irreparable injury for the redress of which they have no adequate remedy at law.

Prayer for Relief

Wherefore, plaintiffs Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman pray this Court for a preliminary, and after trial of this suit, a permanent injunction of the enforcement, operation and execution of Act No. 212 of August 10, 1959, P.L. ——, —— P.S. ——; and for a declaration

that said statute and its enforcement are unconstitutional as against the plaintiffs herein, and for such other and further relief as the Court may deem just and proper.

Klinger and Mann, By: Theodore R. Mann, 515 Robinson Building, Phila., Pa.

Narin & Garfinkel, By: Marvin Garfinkel, 1301 Packard Building, Phila., Pa.

Walter Rabin, 2044 Chestnut Street, Phila., Pa.

Leo Pfeffer, 15 East 84th Street, New York, New York.

[fol. 6]

EXHIBIT "A" TO COMPLAINT

ACT No. 212

Approved August 10, 1959

AN ACT

Amending the act of June 24 1939 (P L 872) entitled "An act to consolidate amend and revise the penal laws of the Commonwealth" prohibiting certain business activities on Sunday

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows

Section 1 The act of June 24 1939 (P L 872) known as "The Penal Code" is amended by adding after section 699.9 a new section to read

Section 699.10 Selling Certain Personal Property on Sunday Whoever engages on Sunday in the business of selling or sells or offers for sale ON SUCH DAY at retail clothing and wearing apparel clothing accessories furniture housewares home business or office furnishings household business or office appliances hardware tools paints building and lumber supply materials jewelry silverware watches clocks luggage musical instruments and recordings

or toys EXCLUDING NOVELTIES AND SOUVENIRS shall upon conviction thereof in a summary proceeding for the first offense be sentenced to pay a fine of not exceeding one hundred dollars ($100) and for the second or any subsequent offense committed within one year after conviction for the first offense be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof

Each separate sale or offer to sell shall constitute a separate offense

Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter

Section 2 This act shall take effect in thirty days

[fol. 11] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION OF PENNSYLVANIA RETAILERS' ASSOCIATION TO INTERVENE AS DEFENDANT—Filed September 11, 1959

Pennsylvania Retailers' Association, by its attorneys, Arthur Littleton and W. James MacIntosh, respectfully moves the court for an order permitting it to intervene as a party defendant in this action and to file an Answer in order to assert defenses in such proposed Answer, copy of which is attached hereto, for the following reasons:

1. Pennsylvania Retailers' Association (herein called "Association") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, whose members are owners or officers of retail stores throughout the Commonwealth of Pennsylvania. Its members operate hundreds of retail stores and employ thousands of persons in their retail operations, and have a vital in-

terest in whether or not business establishments in Pennsylvania will be permitted to operate on Sunday.

2. This action seeks to convene a three-judge court pursuant to the provisions of 28 U.S.C. 2281 and 2284 for the [fol. 12] purpose of passing upon the constitutionality of the Pennsylvania Act of Assembly No. 212 approved August 10, 1959, P.L. , P.S. , and further seeks injunctive relief restraining the defendants from enforcing said laws against plaintiffs.

3. Association has a substantial interest in the subject matter of this action, and the representation of its interest as an association of hundreds of Pennsylvania retail merchants by the present defendant is or may be inadequate. In addition, the Association's interest and the within action have questions of law and fact involving the constitutionality of the above-mentioned statute in common.

4. Intervention by the Association will not delay or prejudice the adjudication of the rights of the original parties.

W. James MacIntosh, Arthur Littleton, Attorneys for Pennsylvania Retailers' Association.

Dated: September , 1959

Morgan, Lewis & Bockius, Of Counsel.

[fol. 15] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed September 11, 1959

Defendants, for whom the City Solicitor has entered an appearance, move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action because the statute which is the subject matter of this action is constitutional on its face.

Thomas A. Masterson, Deputy City Solicitor; David Berger, City Solicitor, Attorneys for Defendants.

[fol. 27] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ABRAHAM BRAUNFELD, et al.

v.

THOMAS J. GIBBONS and VICTOR H. BLANC

CONSENT DECREE—September 11, 1959

Whereas, in the above captioned cause a hearing was held on the 11th day of September, 1959, to determine whether the defendants should be temporarily restrained, until a further hearing for a preliminary injunction before a three-judge district court, from enforcing Act No. 212 of the Commonwealth of Pennsylvania, of August 10, 1959, and notice of said hearing was served upon the defendants, and said defendants appeared at said hearing; and

Whereas, at the said hearing the court suggested that the interest of justice would be served by the entry of an order by stipulation which would preserve the status quo until the court had an opportunity to determine the legal issues raised by the litigation.

Now, Therefore, this 11th day of September, 1959 upon approval of this Court it is stipulated by and between Theodore R. Mann, Esquire, Marvin Garfinkel, Esquire, Walter Rabin, Esquire, and Leo Pfeffer, Esquire, Attorneys for plaintiffs, and David Berger, City Solicitor and Thomas A. Masterson, Deputy City Solicitor, Attorneys for the

[fol. 28] defendants, that the defendants, Thomas J. Gibbons, Commissioner of Police of Philadelphia and Victor H. Blanc, District Attorney of Philadelphia be and they hereby are restrained until further order of this court from directly or indirectly enforcing or being a party to the enforcement of or in any way aiding the enforcement of Act No. 212 approved August 10, 1959 of the Commonwealth of Pennsylvania, against Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman, Joseph R. Friedman, plaintiffs herein.

Theodore R. Mann, Marvin Garfinkel, Walter Rabin, Leo Pfeffer, Attorneys for plaintiffs.

David Berger, City Solicitor; Thomas A. Masterson, Deputy City Solicitor, Attorneys for Defendants.

Approved: So Ordered, J. Cullen Ganey, J.

[fol. 29] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ORDER GRANTING LEAVE TO PENNSYLVANIA RETAILERS' ASSOCIATION TO INTERVENE AS A DEFENDANT—
September 11, 1959

This matter came on for hearing upon motion of Pennsylvania Retailers' Association for leave to intervene in the above entitled action as a party defendant, and it appearing to the court that said Association has an interest in the above entitled action sufficient to warrant it to become a party to the action it is Ordered:

That Pennsylvania Retailers' Association is granted leave to intervene in said action as a party defendant.

Dated this 11th day of September, 1959.

J. Cullen Ganey, U. S. District Judge.

[fol. 196]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 26,945

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN, Plaintiffs,

—v.—

THOMAS J. GIBBONS and VICTOR H. BLANC, Defendants.

Present: Hastie, *Circuit Judge;* Ganey, *Chief District Judge;* and Egan, *District Judge.*

FINAL ORDER VACATING TEMPORARY CONSENT DECREE AND DISMISSING COMPLAINT—December 7, 1959

This cause having been heard on defendants' motion to dismiss the complaint; and the court having fully considered the several briefs and arguments which have been submitted; and this court finding itself in full accord with the reasoning and conclusions of another statutory court of this District in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, No. 25626, decided December 1, 1959, concerning the constitutionality of the Pennsylvania Act No. 212, approved August 10, 1959, prohibiting retail selling of enumerated commodities on Sunday; it is this 7th day of December, 1959,

Ordered, that the Consent Decree issued in this cause on September 11, 1959, temporarily restraining the defendants from enforcing against the plaintiffs Pennsylvania Act No. 212, approved August 10, 1959, be, and it is hereby, vacated and dissolved; it is further

Ordered, that the complaint herein seeking a permanent injunction against the enforcement of Pennsylvania Act

No. 212, approved August 10, 1959, be, and it is hereby, dismissed.

William H. Hastie, Circuit Judge.

J. Cullen Ganey, Chief District Judge.

Thomas C. Egan, District Judge.

[fol. 196a] (Stamp—Sent by Gilbert W. Ludwig, Clerk, United States District Court, Eastern District of Pennsylvania at Philadelphia 7.)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 26945

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S DAVID FRIEDMAN and JOSEPH R. FRIEDMAN, Plaintiffs,

v.

THOMAS J. GIBBONS and VICTOR H. BLANC, Defendants.

Present: Hastie, *Circuit Judge*; Ganey, *Chief District Judge*; and Egan, *District Judge*.

AMENDMENT OF FINAL ORDER—December 10, 1959

The final order dismissing the complaint as filed in this cause on December 7, 1959, is hereby amended by striking the period at the end thereof and adding "without prejudice to the filing of an amended complaint".

William H. Hastie, Circuit Judge.

J. Cullen Ganey, Chief District Judge.

Thomas C. Egan, District Judge.

December 10, 1959

[fol. 197] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No. 26945

ABRAHAM BRAUNFELD
327 South Street
Philadelphia, Pennsylvania

ISAAC FRIEDMAN
759 South 4th Street
Philadelphia, Pennsylvania

ALTER DIAMENT
763 South 4th Street
Philadelphia, Pennsylvania

S. DAVID FRIEDMAN
2247 E. Williams Street
Philadelphia, Pennsylvania
and
JOSEPH R. FRIEDMAN
2247 E. Williams Street
Philadelphia, Pennsylvania

vs.

THOMAS J. GIBBONS
City Hall
Philadelphia, Pennsylvania
and
VICTOR H. BLANC
City Hall
Philadelphia, Pennsylvania

AMENDED COMPLAINT—Filed December 11, 1959

I. Statement as to Jurisdiction

1. This is a civil action brought by the plaintiffs for a preliminary and permanent injunction to prevent the deprivation, under color of Pennsylvania law, of certain rights, privileges and immunities secured to the plaintiffs by the [fol. 198] Constitution of the United States, as hereinafter more fully set forth. The suit also seeks a judgment declaring the aforesaid Pennsylvania law unconstitutional.

2. The suit seeks the convening of a three-judge District Court pursuant to Section 2284 of the Judicial Code. Jurisdiction is conferred upon this Court pursuant to 28 U.S. Code, Section 1343.

3. The defendants reside within the Eastern District of Pennsylvania, which is therefore the proper venue of this action by virtue of 28 U.S. Code, Section 1391(b).

4. Plaintiffs all reside in Philadelphia, Pennsylvania, at the addresses appearing in the caption hereof.

5. Each of the aforesaid plaintiffs is the owner and operator of a store within the City of Philadelphia which sells at retail certain goods, specifically: Abraham Braunfeld owns and operates a retail store at 327 South Street at which he sells clothing and wearing apparel for children; plaintiff Isaac Friedman owns and operates a retail store at 759 South 4th Street at which he sells home furnishings, to wit, draperies and slipcovers; Alter Diament owns and operates a retail store at 763 South 4th Street at which he sells home furnishings, to wit, draperies and slipcovers; S. David Friedman and Joseph R. Friedman own and operate a retail store at 2247 E. Williams Street at which they sell wearing apparel, to wit, shoes.

[fol. 199] 6. The defendant Thomas J. Gibbons, is the Commissioner of Police of the City of Philadelphia, and the defendant Victor H. Blanc is the District Attorney of the City of Philadelphia. The defendants have the responsibility for the enforcement within the City of Philadelphia of the Penal Codes of the Commonwealth of Pennsylvania, including Act No. 212 of August 19, 1959, P.L. ——, —— P.S. ——.

II. Statute Involved

7. This suit is brought to declare the unconstitutionality of and enjoin the enforcement of Act No. 212 of August

10, 1959, P.L. ——, —— P.S. ——, which, by its terms, inter alia, forbids the sale on Sunday of the aforementioned goods sold by the plaintiffs. A copy of the said statute is hereunto annexed and marked Exhibit "A".

III. Factual Allegations

8. Each of the plaintiffs herein is an observant and Orthodox member and adherent of the Jewish faith. The laws of said faith, particularly the Fourth Commandment of the Decalogue, require a total abstention from business and all manner of work from nightfall Friday until nightfall Saturday each week, this period constituting the Sabbath of the Jewish religion; and forbid its adherents to hire other employees regardless of the faith of such employees, to work during this same period.

[fol. 200] 9. The foregoing religious requirement of Sabbath observance occupies a central and primary position in the scheme of religious observances of Orthodox Judaism, and one who does not observe the Sabbath in the manner set forth cannot be an Orthodox Jew.

10. Each of the plaintiffs herein always has abstained, and at the present time continues to abstain from business and all manner of work on the said Jewish Sabbath and keeps his store regularly closed during that period.

11. The defendants have announced that they will enforce said statute against all persons keeping their places of business open on Sunday. The plaintiffs herein therefore are immediately faced with the threat of a prosecution by the defendants for violation of the said statute should they keep their places of business open on Sunday.

12. The plaintiffs have heretofore kept their places of business open on Sunday. If they continue to do so, they will subject themselves to prosecution under the said statute, unless such prosecution is enjoined by this Court and the statute is declared unconstitutional.

13. In the general business area in which the plaintiffs do business, the night and day which the plaintiffs voluntarily stay closed because of their religious convictions,

to wit, Friday night and Saturday, are the night and day of the week on which the greatest volume of business is done by plaintiffs' competitors.

[fol. 201] 14. The volume of business which each of the plaintiffs does on Sunday is substantially less than the volume of business which each of the plaintiffs would do if he stayed open on Saturday or on Friday night and Saturday.

15. Each of the plaintiffs does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sunday.

16. Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment.

First Count

17. The aforesaid Pennsylvania statute, Act No. 212 of August 10, 1959, P.L. ——, —— P.S. ——, and the enforcement thereof as announced and threatened by the defendants, are in violation of the First and Fourteenth Amendments to the United States Constitution in that the said statute constitutes a law respecting an establishment of religion and are unconstitutional as against the plaintiffs herein.

Second Count

18. The said statute, Act No. 212 of August 10, 1959, P.L. ——, —— P.S. ——, and the enforcement thereof as announced and threatened by the defendants put to the plaintiff, Abraham Braunfeld, the choice of giving up his [fol. 202] business and capital investment or giving up his faith and put to the other plaintiffs the choice of giving up a substantial part of their income or giving up their faith, and therefore prohibiting the free exercise of their religion, in violation of the First and Fourteenth Amendments of the United States Constitution as applied to the plaintiffs herein.

Third Count

19. The specification of the goods that are forbidden for sale on Sunday in the said statute and the exclusion of all other goods is completely irrational and arbitrary and bear no rational relationship to any legislative objective within the constitutional competence of the Commonwealth of Pennsylvania and the said statute therefore is unconstitutional as against the plaintiffs herein, in that it denies to them the equal protection of the law and deprives them of their property without due process in violation of the Fourteenth Amendment to the United States Constitution.

Irreparable Injury

20. If the said statute is enforced against the plaintiffs as heretofore set forth, the plaintiffs will suffer irreparable injury for the redress of which they have no adequate remedy at law.

[fol. 203]

Prayer for Relief

Wherefore, plaintiffs Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman pray this Court for a preliminary, and after trial of this suit, a permanent injunction of the enforcement, operation and execution of Act No. 212 of August 10, 1959, P.L. ——, —— P.S. ——; and for a declaration that said statute and its enforcement are unconstitutional as against the plaintiffs herein, and for such other and further relief as the Court may deem just and proper.

Klinger & Mann, By: Theodore R. Mann, 515 Robinson Building, Phila., Pa.

Narin & Garfinkel, By: Marvin Garfinkel, 1301 Packard Building, Phila., Pa.

Walter Rabin, 2044 Chestnut Street, Phila., Pa.

[fol. 204]

EXHIBIT "A" TO AMENDED COMPLAINT

ACT NO. 212

Approved August 10, 1959

AN ACT

Amending the act of June 24 1939 (P L 872) entitled "An act to consolidate amend and revise the penal laws of the Commonwealth" prohibiting certain business activities on Sunday

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows

Section 1 The act of June 24 1939 (P L 872) known as "The Penal Code" is amended by adding after section 699.9 a new section to read

Section 699.10 Selling Certain Personal Property on Sunday Whoever engages on Sunday in the business of selling or sells or offers for sale ON SUCH DAY at retail clothing and wearing apparel clothing accessories furniture housewares home business or office furnishings household business or office appliances hardware tools paints building and lumber supply materials jewelry silverware watches clocks luggage musical instruments and recordings or toys EXCLUDING NOVELTIES AND SOUVENIRS shall upon conviction thereof in a summary proceeding for the first offense be sentenced to pay a fine of not exceeding one hundred dollars ($100) and for the second or any subsequent offense committed within one year after conviction for the first offense be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof

Each separate sale or offer to sell shall constitute a separate offense

Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter

Section 2 This act shall take effect in thirty days

[fol. 208] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION TO DISMISS AMENDED COMPLAINT—Filed December 11, 1959

Defendants, for whom the City Solicitor has entered an appearance, move the Court as follows:

1. To dismiss the action because the Amended Complaint fails to state a substantial Federal question.

2. To dismiss the action because the Amended Complaint fails to state a claim against the defendants upon which relief can be granted.

3. To dismiss the action because the statute which is the subject matter of this action is constitutional on its face.

Thomas A. Masterson, Deputy City Solicitor; David Berger, City Solicitor, Attorneys for Defendants.

[fol. 210] [File endorsement omitted]

[Handwritten Notations

Copies to: Thos. Masterson. Thos. Mann, Benj. Quigg, Jr.
Phoned: Thos. Masterson, Thos. Mann, Benj. Quigg, Jr.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN, Plaintiffs,

—v.—

THOMAS J. GIBBONS and VICTOR H. BLANC, Defendants.

Present: Hastie, *Circuit Judge;* Ganey, *Chief District Judge* and Egan, *District Judge.*

FINAL ORDER DISMISSING AMENDED COMPLAINT—December 16, 1959

This cause having been submitted on the Amended Complaint and defendants' motion to dismiss that complaint;

and this court finding itself in full accord with the reasoning and conclusions of another statutory court of this district in *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, No. 25626, decided December 1, 1959, concerning the constitutionality of Pennsylvania Act No. 212, approved August 10, 1959, prohibiting retail selling of enumerated commodities on Sunday; and the court finding nothing in the Amended Complaint herein to make the legal ruling in the aforesaid case No. 25626 inapplicable; it is this 16th day of December, 1959,

Ordered that the complaint herein seeking a permanent injunction against the enforcement of Pennsylvania Act No. 212, approved August 10, 1959, be and it is hereby dismissed.

William H. Hastie, Circuit Judge.

J. Cullen Ganey, Chief District Judge.

Thomas C. Egan, District Judge.

[fol. 212] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No. 26,945

ABRAHAM BRAUNFELD
ISAAC FRIEDMAN
ALTER DIAMENT
S. DAVID FRIEDMAN and
JOSEPH R. FRIEDMAN, Plaintiffs,

v.

THOMAS J. GIBBONS and VICTOR H. BLANC, Defendants,

and

PENNSYLVANIA RETAILERS' ASSOCIATION, Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 11, 1960

Notice is hereby given that Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman, and Joseph

R. Friedman, plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order dismissing the Complaint, entered in this action on December 16, 1959.

1. This appeal is taken pursuant to 28 U.S.C., Sec. 1253.

[fol. 213] 2. The clerk will please prepare a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court of the United States.

3. The following questions are presented by this appeal:

a. Whether the enforcement of Pennsylvania Act No. 212, approved August 10, 1959 (which prohibits retail selling of enumerated commodities on Sunday), against retailers whose religion forbids them from engaging in work and commercial activity, and from employing others to engage in commercial activity for them, on Friday evening and Saturday, and who are in open competition with other retailers who keep open their business establishments on Friday evening and Saturday, interferes with their free exercise of religion in violation of the 1st Amendment or the due process clause of the 14th Amendment to the United States Constitution, where the loss of business resulting from the enforcement thereof puts them to the choice of going out of business or violating their religious obligation.

b. Whether the enforcement of Pennsylvania Act No. 212, approved August 10, 1959 (which prohibits retail selling of enumerated commodities on Sunday), against retailers whose religion forbids them from engaging in work and commercial activity, and from employing others to engage in commercial activity for them, on Friday evening and Saturday, and who are in open competition with other retailers who keep open their business establishments on [fol. 214] Friday evening and Saturday, interferes with their free exercise of religion in violation of the 1st Amendment or the due process clause of the 14th Amendment to the United States Constitution.

c. Whether Pennsylvania Act No. 212, approved August 10, 1959 (which prohibits retail selling of enumerated com-

modities on Sunday), and the enforcement thereof, violate the proscription against an establishment of religion in the 1st Amendment or in the due process clause of the 14th Amendment to the United States Constitution.

d. Whether Pennsylvania Act No. 212, approved August 10, 1959 (which prohibits retail selling of enumerated commodities on Sunday), is arbitrarily selective in the commodities and businesses affected and, therefore, violative of the equal protection clause or the due process clause of the 14th Amendment to the United States Constitution.

Stephen B. Narin, Esq., Attorney for Appellants, 1301 Packard Building, 15th and Chestnut Streets, Philadelphia, Pa.

[fol. 215] Proof of Service (omitted in printing).

[fol. 216] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 217]

Supreme Court of the United States

No. 845, October Term, 1959

Abraham Braunfeld, et al., Appellants,

vs.

Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, et al.

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Order Noting Probable Jurisdiction—May 23, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary calendar and set for argument immediately following No. 532.

May 23, 1960

[fol. 218]

SUPREME COURT OF THE UNITED STATES

No. 67, October Term, 1960

ABRAHAM BRAUNFELD, et al., Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, et al.

ORDER OF SUBSTITUTION—October 24, 1960

On Consideration of the motion to substitute Albert N. Brown in the place of Thomas J. Gibbons as a party appellee and to correct and amend title and caption to show Pennsylvania Retailers' Association as a party appellee in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

LE COPY

SUPREME COURT, U.S.
FILED
APR 8 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 845 67

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

On Appeal from the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. §2281 et seq.

JURISDICTIONAL STATEMENT.

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Pennsylvania Act of August 10, 1959, 18 Purd. Pa. Stat. Ann. §4699.10 .....

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1959.

No. ——

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. §2281 ET SEQ.

JURISDICTIONAL STATEMENT.

A.

OPINIONS DELIVERED IN COURT BELOW.

The final order of the three-judge court, filed on Decem ber 16, 1959, dismissing the plaintiff's amended complai has not been reported and is annexed hereto as Appendi A, *infra*. Appendix B, *infra*, is the opinion of Decembe 1, 1959, and certain supplementary Findings of Fact date December 7, 1959, of another specially constituted thre judge court of this district in *Two Guys From Harriso Allentown, Inc. v. McGinley*, No. 25626 (E. D. Pa. 1959 and referred to in the final order of the court in the insta case.

B.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

The jurisdiction of this Court is invoked under 28 U. S. C §§1253, 1291 and 2281 *et seq.*, the appeal being from a fin order (entered on December 16, 1959) of a three-judg court which refused a permanent injunction sought by ap pellants on the ground that the state statute hereinafte referred to conflicted with the United States Constitutio and dismissed their Complaint. *Query v. United States*, 3 U. S. 486, 490-91 (1942); see also *Lee v. Roseberry*, 200 F. 2 155, 156 (C. A. 6th, 1952); *cf. Radio Corp. of America United States*, 341 U. S. 412 (1951).

The notice of appeal to this Court was filed on Februa 11, 1960, in the United States District Court for the Easte District of Pennsylvania.

C.

STATUTES INVOLVED.

This litigation involves the validity of the Pennsylvania act of August 10, 1959, which provides:

> "Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> "Each separate sale or offer to sell shall constitute a separate offense . . ." P. L. No. 212, 18 Purd. Pa. Stat. Ann. § 4699.10.

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States, including the equal protection and due process clauses of the latter Amendment.

D.

QUESTIONS PRESENTED.

1. Whether the enforcement of the Pennsylvania Act of August 10, 1959, against retailers whose religion forbids them from engaging in work and commercial activity, personally or through others, on Friday evening and Saturday, and who are in competition with other retailers who operate their businesses on Friday evening and Saturday, *interferes with their free exercise of religion*, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, where the loss of business resulting from such enforcement will put such retailers to the choice of either giving up their faith, or

(a) substantially reducing their ability to earn a livelihood (in the case of four of the appellants), or

(b) going out of business and losing a substantial capital investment (in the case of one of the appellants).

2. Whether the enforcement of the Pennsylvania Act of August 10, 1959, against retailers whose religion forbids them from engaging in work and commercial activity, personally or through others, on Friday evening and Saturday, and who are in competition with other retailers who operate their businesses on Friday evening and Saturday, *hinders Orthodox Judaism in its ability to compete for adherents with other sects*, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, where the loss of business resulting from such enforcement will put such retailers to the choice of either giving up their faith, or

(a) substantially reducing their ability to earn a livelihood (in the case of four of the appellants), or

(b) going out of business and losing a substantial capital investment (in the case of one of the appellants).

3. Whether the Pennsylvania Act of August 10, 1959, and the enforcement thereof, violate the proscription against an establishment of religion in the due process clause of the Fourteenth Amendment to the United States Constitution by preferring certain religious sects and by protecting certain religious sects without offering the same protection to other religious sects.

4. Whether the Pennsylvania Act of August 10, 1959 is arbitrarily selective in the commodities and businesses affected in violation of the equal protection or due process clause of the Fourteenth Amendment to the United States Constitution.

E.

STATEMENT OF THE CASE.

Appellants, plaintiffs below, instituted a suit seeking a permanent injunction restraining the enforcement of the Pennsylvania Act of August 10, 1959, P. L. 212, 18 Purd. Stat. §4699.10, hereinbefore set forth.

The court below was convened pursuant to section 2281 *et seq.* of Title 28, U. S. C. A motion to dismiss was filed and a consent decree, temporarily restraining enforcement of the Act, was entered. On December 7, 1959 the complaint was dismissed and the temporary restraining order was dissolved. On December 10, 1959 permission to file an amended complaint was granted, and such a complaint was thereafter filed by appellants.

Their amended complaint alleged in part that:

"* * *

"5. Each of the aforesaid plaintiffs is the owner and operator of a store within the City of Philadelphia which sells at retail certain goods, specifically: Abraham Braunfeld owns and operates a retail store at 327 South Street at which he sells clothing and wearing apparel for children; plaintiff Isaac Friedman owns and operates a retail store at 759 South 4th Street at which he sells home furnishings, to wit, draperies and slip-covers; Alter Diament owns and operates a retail store at 763 South 4th Street at which he sells home furnishings, to wit, draperies and slipcovers; S. David Friedman and Joseph R. Friedman own and operate a retail store at 2247 E. Williams Street at which they sell wearing apparel, to wit, shoes.

"* * *

"8. Each of the plaintiffs herein is an observant and Orthodox member and adherent of the Jewish faith. The laws of said faith, particularly the Fourth Commandment of the Decalogue, require a total abstention from business and all manner of work from nightfall Friday until nightfall Saturday each week, this period constituting the Sabbath of the Jewish religion; and forbid its adherents to hire other employees regardless of the faith of such employees, to work during this same period.

"9. The foregoing religious requirement of Sabbath observance occupies a central and primary position in the scheme of religious observances of Orthodox Judaism, and one who does not observe the Sabbath in the manner set forth cannot be an Orthodox Jew.

"10. Each of the plaintiffs herein always has abstained, and at the present time continues to abstain from business and all manner of work on the said Jewish Sabbath and keeps his store regularly closed during that period.

"12. The plaintiffs have heretofore kept their places of business open on Sunday. If they continue to do so, they will subject themselves to prosecution under the said statute, unless such prosecution is enjoined by this Court and the statute is declared unconstitutional.

"13. In the general business area in which the plaintiffs do business, the night and day which the plaintiffs voluntarily stay closed because of their religious convictions, to wit, Friday night and Saturday, are the night and day of the week on which the greatest volume of business is done by plaintiffs' competitors.

"14. The volume of business which each of the plaintiffs does on Sunday is substantially less than the volume of business which each of the plaintiffs would do if he stayed open on Saturday or on Friday night and Saturday.

"15. Each of the plaintiffs does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sundays.

"16. Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment."

Plaintiffs averred that the Act violated the United States Constitution in the particulars set forth hereinbefore (see Questions Presented).

Appellees, defendants below, moved to dismiss the amended complaint on the grounds that (a) no substantial federal question was presented; (b) no claim was stated against defendants upon which relief could be granted; and (c) the Act was constitutional on its face.

On December 16, 1959, the three-judge statutory court below dismissed the amended complaint, and held that the

instant case came within the legal ruling in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, No. 25626, decided on December 1, 1959 by another statutory court of the same district.

Unlike the *Two Guys from Harrison-Allentown, Inc. v. McGinley* case, *supra* (in which case an appeal to this court has been taken, October Term, 1959, No.), the appellants here are Sabbath-observing Jews who are in open competition with others who operate on Friday nights and Saturdays. Thus, in addition to those constitutional problems which the two cases have in common, the enforcement of the statute against the appellants in the instant case raises certain constitutional questions which are dissimilar to those raised in *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra.*

During the course of the proceedings below, the Pennsylvania Retailers' Association was granted leave to intervene as a party defendant, and the following organizations were granted leave to appear as *amicus curiae* and filed briefs in support of Appellants:

East Pennsylvania Conference of Seventh Day Adventists

Rabbinical Association of Philadelphia

Philadelphia Board of Rabbis

Jewish Community Relations Council of Philadelphia, representing thirty-one Jewish communal organizations

F.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL, WERE WRONGLY DECIDED BELOW, AND ARE OF GREAT PUBLIC IMPORTANCE.

I.

Enforcement of the statute will tend to compel Sabbatarian retailers to abandon their faith.

The establishment and the free exercise clauses have been and still are the focal points of considerable controversy and litigation. But if there is any area of agreement about the meaning of those very controversial constitutional guarantees, it is that no state may pass legislation tending to compel its residents to give up their religion (see *McCollum v. Bd. of Education*, 333 U. S. 203, 210-211 (1948)), absent a clear and present danger (compare *Jacobson v. Massachusetts*, 197 U. S. 11; *Reynolds v. United States*, 93 U. S. 145; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Prince v. Massachusetts*, 321 U. S. 158; *Davis v. Season*, 133 U. S. 333). This Blue Law, applied to these appellants, does just that, and this is the only Blue Law case now or ever before this Court presenting such facts.

Appellants and others like them voluntarily assume a competitively disadvantageous position by closing their retail businesses on what have become the best business night and the best business day of the week. They do so because the Fourth Commandment of the Decalogue compels them to, and they cannot remain Orthodox Jews if they do not "remember the Sabbath day to keep it holy" by this kind of Sabbath observance. Unlike some other Sabbatarian business men—unlike the kosher butchers in *Friedman v. New York*, 341 U. S. 907 (1951), whose competitors like-

wise closed on the Jewish Sabbath—the appellants here are in open competition with other retailers who do stay open on Friday nights and Saturdays. If appellants are forced to close *on the only day of the weekend on which they have until now been open*, many or most of their Sunday customers will buy elsewhere, on Friday nights and Saturdays. The consequent economic pressure of the State statute upon appellants to abandon the Fourth Commandment and thereby Orthodox Judaism, is obvious. Compare *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

It is this element of compulsion to give up one's religious faith which distinguishes this case from *Friedman v. New York, supra*, in which an appeal to this Court was dismissed for want of a substantial federal question.

Furthermore it is clearly the statute which is the primary cause of such baneful results, rather than appellants' religion. Appellants and those of similar religious persuasion have until now been able to keep their faith and survive in the business world, even though their day of rest and our society's best shopping day coincide. There may be increasing pressures toward social conformity, but our still complex, culturally pluralistic people have always been able to accommodate the persevering Sabbatarian. *It is the statutory compulsion—the power of government—that makes the difference.* Perhaps in acknowledgment of that fact, many of the twenty-four states which have enacted Sunday Closing Laws have provided exemptions for those who observe another day of rest.*

If the determination of the free exercise issue requires in any way a balancing of the rights of the individual and the dangers to society, then the extent of the economic loss

---

* Mich. Stat. Vol. 13, §18.855; Conn. Gen. Stat., §8609 (1949); Ind. Stat. Ann. Ch. 43, §10-4301 (Burns 1933); Iowa Code Ann. Ch. 729, §1; Ill., Smith-Hurd Ann. Stat., Ch. 38, §549; Ohio Gen. Code Ann., §13045 (Page's); Kentucky Stte. 436.160 (1903); Okla. Stte. tit. 21, §909 (1951); Maine Laws, Ch. 121, §360; Va. Code, §18830 (1950); W. Va. Code Ann., §6073 (1943); Wis. Stte., §351.52.

o the appellants resulting from the enforcement of the tatute becomes a decisive consideration. For the pressure -State pressure—upon them to give up their religion can e measured only by the extent of the economic loss re-ulting from the additional competitive disadvantage they re put to when they are deprived of the only remaining ay of the weekend.

Thus, one of the appellants will go out of business if the tatute is enforced against him, and the others will sustain erious economic loss over and above that which they vol-ntarily assumed by remaining faithful to their religious bligations. *Counsel has no way of knowing what per-entage of Sabbatarians situated like appellants would con-nue to suffer the economic loss and what percentage would stead quietly give up the faith that until now has been eirs. But the pressure, the compulsion, is there. They n, of course, go out of business and continue to worship d believe as did their fathers without further interfer-ce by the State, and some would undoubtedly do just at. But was the First Amendment meant to protect only e staunch?* And even so far as such faithful souls are ncerned, can they constitutionally be compelled to pay ch a price?

II.

nforcement of the statute against Sabbatarian retailers will place Sabbatarian faiths at a serious disadvantage in their competition with other sects.

In *Zorach v. Clauson*, 343 U. S. 306 (1952) (decided after iedman v. New York, supra) this Court said that the tes must let each religion "flourish according to the zeal its adherents and the appeal of its dogma". This is the sence of religious freedom—free competition between ts. "The government must be neutral when it comes to

competition between sects." *Zorach v. Clauson, supra.* The majority of sects observe Sunday; others, in direct competition with them for adherents, observe Saturday as their day of rest. *Is the government keeping its hands off this competition when it selects one of those two days as the* STATE'S *day of rest? And when a Sabbatarian retailer who must observe both his own and the State's day of rest, is unable to operate at any time during the entire weekend, is his faith being permitted to "flourish according to the zeal of its adherents and the appeal of its dogma"?* This is the element present in the instant case and absent in *Friedman v. New York, supra,* where this Court's decision could not have had any effect on the ability of the faith involved, Orthodox Judaism, to compete for adherents. Here, the continued enforcement of the statute on Orthodox Jewish retailers will obviously affect the ability of that faith to compete with other sects—particularly other Jewish sects.

III.

The statute prefers and protects non-Sabbatarian Christianity, and is clearly violative of the establishment clause.

If the enforcement of the statute tends to compel Sabbatarian retailers to give up their faith, and puts Sabbatarian faiths at a disadvantage in the competition between sects, the law should be declared unconstitutional as infringing upon free exercise regardless of whether the statute is a religious measure, unless appellees can establish, after a hearing, that there is a clear and present danger to society which would justify such an impairment of religious liberty. *Thomas v. Collins,* 323 U. S. 516 (1945). But this case is much stronger than that, because the Court below relied upon the decision in *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra,* where it was said:

"We think it cannot be seriously questioned that in their relation to the first day Sabbath as an institution of Christianity the New York and Pennsylvania statutes have a common background and were in original conception designed to the same end. Moreover, the involvement of religious considerations appears clearly on the face of the basic statute in both states." (Appendix B, *infra*, p. 26.)

IV.

Conclusion.

Thus, what is so clearly involved in the enforcement of the statute is

(a) the preference of certain Christian sects and the protection of those sects by the State, which is not affording similar protection to other Christian and Jewish sects (see *Crown Kosher Super Market v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), now pending before this Court);

(b) the serious hampering of the ability of Sabbatarian faiths to compete with other faiths for adherents;

(c) very substantial economic pressure upon the individual Sabbatarian retailer to give up his faith or his business.

The rights involved are basic to the existence of a free society, and the substantiality of the federal questions would be obvious, but for the decision of this Court in *Friedman v. New York, supra*, that no substantial federal question was there involved. The basic distinction between that case and this has been discussed above. Enforcement of the New York law against the appellants in that matter

did not result either in pressure upon the appellants to give up their faith or in a competitive disadvantage to Orthodox Judaism in competition between sects. Further, the concept of free competition between sects was first set forth by this Court *after Friedman v. New York* was dismissed. *Zorach v. Clauson, supra.* Nor did the lower court in *Friedman v. New York* admit that the law involved was meant to protect Christianity, as did the court in *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra.*

Lastly, doubt recently cast upon the constitutionality of this and similar statutes by members of the United States Courts of Appeal makes a review of the whole question by the highest Court in the land desirable. Judges Goodrich and Hastie, of the Court of Appeals for the Third Circuit, said in a *per curiam* opinion dated December 28, 1959:

> "If the question involved in this case came to us as one of first impression we should find great difficulty in upholding the constitutionality of the legislation in question here."
>
> *Bargaintown, U.S.A., Inc., et al. v. James R. Whitman, et al.* (M. D. Pa. 1959, Civil Action #6760).

Judge Hastie, in *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra,* said:

> "If the view of the establishment of religion question thus authoritatively established by the Supreme Court is to be changed it is for that Court, not an inferior court, to do so."

And Judge Magruder, in *Crown Kosher Super Market v. Gallagher,* 176 F. Supp. 466 (D. Mass. 1959), which is now pending before this Court, struck down the Massachusetts Blue Law statute as applied to the Sabbatarians there involved.

For all of the foregoing reasons, appellants submit that

the federal questions involved are substantial, were wrongly decided below, and are of great public importance.

Respectfully submitted,

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Dated: April 5, 1960.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 26945.

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Plaintiffs,

v.

THOMAS J. GIBBONS and VICTOR H. BLANC,

Defendants.

Present: HASTIE, *Circuit Judge;* GANEY, *Chief District Judge;* and EGAN, *District Judge.*

FINAL ORDER DISMISSING AMENDED COMPLAINT.

[Filed December 16, 1959]

This cause having been submitted on the Amended Complaint and defendants' motion to dismiss that complaint;

and this court finding itself in full accord with the reasoning and conclusions of another statutory court of this district in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, No. 25626, decided December 1, 1959, concerning the constitutionality of Pennsylvania Act No. 212, approved August 10, 1959, prohibiting retail selling of enumerated commodities on Sunday; and the court finding nothing in the Amended Complaint herein to make the legal ruling in the aforesaid case No. 25626 inapplicable; it is this 16th day of December, 1959,

ORDERED that the complaint herein seeking a permanent injunction against the enforcement of Pennsylvania Act No. 212, approved August 10, 1959, be and it is hereby dismissed.

/s/ WILLIAM H. HASTIE,
Circuit Judge.
/s/ J. CULLEN GANEY,
Chief District Judge.
/s/ THOMAS C. EGAN,
District Judge.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 25626.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Plaintiff

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,
Defendant

Before: HASTIE, *Circuit Judge;* WELSH, *Senior District Judge;* and LORD, *District Judge.*

OPINION.

[Filed December 1, 1959]

By HASTIE, *Circuit Judge.*

This case has been tried to a statutory three-judge court constituted as provided in Sections 2281 and 2284 of Title

28, United States Code. The plaintiff, Two Guys From Harrison-Allentown, Inc., seeks an injunction to prevent the District Attorney of Lehigh County from enforcing against its employees, and thus against its retail selling business, the criminal sanctions of the Pennsylvania Sunday closing laws, sometimes called the Sunday "blue laws". Continuously since 1957 plaintiff has operated a large department store, employing some 300 persons, in a suburban area near the City of Allentown in Lehigh County. This store opens for business on Sunday as well as on the other six days of the week. About one-third of its business is done on Sunday.

The pleadings allege and the evidence establishes as a fact that, prior to a 1959 amendment of the "blue laws", the defendant had undertaken to enforce against the plaintiff's business and its employees the general provision of the Act of June 24, 1939, P. L. 872, §699.4, 18 P. S. §4699.4 that "whoever does or performs any wordly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted) . . . shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars . . . ." It is also alleged and appears as a fact that the defendant is now threatening to enforce against the plaintiff's business and employees Section 699.10 as added to the Sunday closing law by the Act of August 10, 1959, P. L. 212, 18 P. S. §4699.10, which reads as follows:

> "Whoever engages on Sunday in the business of selling, or sells, or offers for sale on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business, or office furnishings, household, business, or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall upon conviction thereof in a summary proceeding for the first offense be sen-

tenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense . . . ."

The evidence does not show and the court does not find any present or continuing threat to enforce against plaintiff's retail selling the above quoted provision of the 1939 statute, although the defendant has expressed the legal view that both the old Section 699.4 and the new Section 699.10 apply to the situation of the plaintiff.

In these circumstances a question arises at the outset which affects the scope of proper present inquiry. Since the 1959 amendment has made the retail sale of specific categories of merchandise on Sunday a wrong punishable by a fine of one hundred dollars, does the sale of such merchandise continue to be punishable by a fine of four dollars under the older general prohibition of "worldly employment or business on Sunday"?

The 1959 enactment says nothing about the earlier general prohibition although it was enacted as an amendatory addition to Section 699 of the Penal Code in which the earlier prohibition appears. We think it can reasonably be argued that the new section supersedes the older one insofar as the latter covered in generality activities now specifically dealt with and more severely punished in the amendatory enactment. *Cf. Commonwealth v. Brown*, 1943, 346 Pa. 192, 29 A. 2d 793; *Commonwealth v. Gross*, 1941, 145 Pa. Sup. 92, 21 A. 2d 238. In any event, here is a substantial unsettled question concerning the construction of the questioned state legislation. When the Pennsylvania courts decide this question they may well resolve it by an interpretation which will relieve the plaintiff and those associated with it of any punitive action under the 1939 statute.

In such a situation it is our duty to refrain from passing upon the constitutionality of the 1939 statute until the state courts have made clear whether it applies at all to the plaintiff since the 1959 amendment. *Harrison v. N. A. A. C. P.*, 1959, 360 U. S. 167; *Spector Motor Service v. McLaughlin*, 1944, 323 U. S. 101; *Railroad Commission v. Pullman Co.*, 1941, 312 U. S. 496. Even if the statute were clear, a court of the United States should, as a matter of policy to minimize interference with state action, refuse gratuitously to pass on the constitutionality of a provision of a state law when the plaintiff cannot show present urgent need for federal intervention to prevent actual or imminently threatened deprivation of constitutional right. Plaintiff is in no such jeopardy now under the 1939 statute. In these circumstances we think it inappropriate to pass upon the constitutionality of the 1939 statute at this time or even, as was done in the cases cited above, to hold the case *sub judice* pending an interpretative state ruling. It is enough to say that our disposition of the present case shall not bar future resort to this court by the plaintiff if and when the state courts shall authoritatively decide that the 1939 statute still applies to selling which is covered by the 1959 amendment, and if and when plaintiff's business shall be jeopardized by a present threat of prosecution under the 1939 statute. The present adjudication will concern the 1959 amendment only.

Plaintiff attacks the Pennsylvania legislation commanding the cessation of certain worldly activity on Sunday as state action promoting "an establishment of religion" contrary to the prohibition of the First Amendment, as made applicable to the states by the Fourteenth Amendment. The argument is that this required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ. There is testimony which establishes as a fact in this record that this view of the religious significance of enforced Sunday work

stoppage is sincerely held by many persons whose religion does not recognize the divinity or resurrection of Jesus of Nazareth or the sacredness of Sunday as the "Lord's day".

At the outset we consider a contention that this First Amendment argument has been foreclosed by authoritative determinations of the constitutionality of Sunday laws essentially similar to the Pennsylvania statute. At the turn of the century, before the Supreme Court had ruled that the First Amendment guarantees are enforceable through the Fourteenth Amendment against the states,[1] Sunday "blue laws" were upheld in two familiar decisions of the Court. *Hennington v. Georgia*, 1896, 163 U. S. 299; *Petit v. Minnesota*, 1900, 177 U. S. 164.[2] If these stood alone their present authority would be questionable in the light of the development of constitutional concepts during this century. But more recently a new test of the constitutionality of Sunday legislation was sought in an appeal to the Supreme Court from a conviction under the New York Sunday laws. *Friedman v. New York*, 1951, 341 U. S. 907. In the jurisdictional statement filed in the Supreme Court in support of that appeal the appellant said: "The question to be resolved is an important one: Are *Hennington v. Georgia* and *Petit v. Minnesota* still law in view of the *Everson* and *McCollum* decisions"? Accordingly, it is appropriate that we examine that case carefully.

The defendants in the *Friedman* case, who were Orthodox Jews, had been convicted of the retail selling of kosher meat on Sunday in violation of the New York prohibition

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[1] The ruling as to freedom of religion was first made in 1940 in **Cantwell v. Connecticut**, 310 U. S. 296, 303, although first foreshadowed fifteen years earlier. **Gitlow v. New York**, 1925, 268 U. S. 652.

[2] See also the earlier dictum in **Soon Hing v. Crowley**, 1885, 113 U. S. 703, 710: "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

against "all manner of public selling [except for many miscellaneous exemptions] . . . upon Sunday . . . ." 39 N. Y. Consol. Laws, McKinney, 1944, §2147. The defense was carefully planned and organized under the direction of Leo Pfeffer, Esquire, a distinguished advocate and legal writer who had specialized in the field of religious liberty.[3] Before the Supreme Court the appellant's very explicit statement of "Questions Presented" read in part as follows:

> "1. Whether the New York Sabbath Law (Article 192 of the New York Penal Law) is a law respecting an establishment of religion and is, therefore, invalid in its entirety under the First Amendment to the United States Constitution which is made applicable to the States by the Fourteenth Amendment.
>
> "2. Whether the New York Sabbath Law is constitutionally invalid as violative of the freedom of religion provision of the United States Constitution, because it fails to exempt from its operations persons whose religious convictions compel them to observe a day other than Sunday as their holy day of rest.
>
> "3. Whether the New York Sabbath Law by reason of its 'crazy quilt' pattern of inclusions and exclusions is arbitrary and discriminatory and therefore violative of the 'equal protection of the law' and 'due process' provisions of the United States Constitution."

Of course these points were appropriately elaborated. Moreover, they had been raised at trial and had been considered and decided against the defendants by the highest court of New York. *People v. Friedman*, 1950, 302 N. Y. 75, 96 N. E. 2d 184. Indeed, Mr. Pfeffer points out in his book, and his submission must have made it plain to the Supreme Court, that this was essentially a test case to

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[3] **Pfeffer's Church, State, and Freedom,** 1953, discusses Sunday laws in general and the **Friedman** case in detail at pages 227-241.

determine the vitality of the doctrine of the *Hennington* and *Petit* cases in the light of contemporary understanding of the reach of the First and Fourteenth Amendments. There can be no question but that the Supreme Court was plainly urged to find in the New York law the very constitutional infirmities we are now asked to find in the Pennsylvania law. Yet, without permitting oral argument the Court disposed of the case in a per curiam opinion dismissing the appeal and saying merely: "The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question." 341 U. S. 907. In these circumstances the *Friedman* case seems to mean that in the Supreme Court's view such legislation as the New York law is so clearly invulnerable to First and Fourteenth Amendment attack that it would not even be useful to permit further argument of the matter.[4]

In effect, the Court was content to leave as the law of the land its old reasoning that "the legislature having . . . power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it

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[4] As early as 1902 the Supreme Court recognized the stare decisis effect of its per curiam disposition of cases properly appealed to it. **Fidelity & Deposit Co. v. United States,** 1902, 187 U. S. 315, 319. In more recent times this point has become important in the administration of the Court's rules and procedure which require that an appeal of right from a state court be supported by a jurisdictional statement, stating "the reasons why the questions presented are so substantial as to require plenary consideration . . . ." Rule 15, par. 1(e), 346 U. S. 962. If that showing is insufficient or unpersuasive a per curiam dismissal for want of a substantial federal question or a summary affirmance of the judgment below follows. Unless such a dismissal is grounded in some procedural or technical insufficiency of appellant's presentation, its meaning seems to be that the disposition of the federal question by the state court was clearly right. In essence, such a per curiam is likely to be a particularly emphatic ruling on the merits of the question. The Court itself has explicitly recognized such summary rulings as authoritative precedents. **Baskin v. Industrial Accident Commission,** 1949, 338 U. S. 854; **North Coast Transportation Co. v. United States,** 1944, 323 U. S. 668. See also the statement of Mr. Justice Brennan, concurring in **Eason v. Price,** 1959, 360 U. S. 246, 247, that, "votes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ."

was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed. . . ." See *Hennington v. Georgia, supra*, at 304.

As an inferior court asked to hold unconstitutional the Pennsylvania laws prohibiting certain Sunday retail selling, we can escape from the obligation to apply the ruling in the *Friedman* case only if the Pennsylvania law is so significantly different from the New York law that a different result can be reached and justified without departing from the legal view for which the *Friedman* case stands.

It has been suggested that the New York law differs significantly from the Pennsylvania law in two respects. First, the aim to protect the Christian Sabbath from profanation is said to be much plainer in Pennsylvania than in New York. In this connection, the text of the laws, their history and their judicial interpretation all are relevant. The basic Sunday "blue laws" of Pennsylvania, New York and many other states today are derived from colonial and early state statutes which, in turn, had been derived from British laws designed to require observance and to prevent profanation of the Christian Sabbath. A hundred years before the American revolution an English statute prohibited any person from engaging in "worldly labor or business or work of the ordinary calling on the Lord's Day, works of necessity and charity excepted". 1676, 29 Car. II, C. 7. The colonial theocracies, among them both New York and Pennsylvania, adopted markedly similar legislation which they reenacted after they became states of the United States of America.[*] The basic Pennsylvania statute as it has come down to us in Section 699.4 of the codification of 1939, with its prohibition of "worldly employment or

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[*] See the summary of the evolution of legislation against "Sabbath breaking" in New York from colonial times in the dissenting opinion of Judge McCarthy in **Crown Kosher Super Market v. Gallagher**, D. Mass., 1959, 176 F. Supp. 466, 477, 484.

business . . . on the Lord's Day", has already been set out. The New York statute, 39 N. Y. Consol. Laws, McKinney, 1944, §2140 begins with this declaration:

> "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

Pursuant to this declaration the statute prohibits, among other things, "all manner of public selling" except for miscellaneous exemptions. §2147. We think it cannot be seriously questioned that in their relation to the first day Sabbath as an institution of Christianity the New York and Pennsylvania statutes have a common background and were in original conception designed to the same end. Moreover, the involvement of religious considerations appears clearly on the face of the basic statute in both states.

Local judicial interpretation of the two statutes tells the same story. In the case of *People v. Dunford*, 1912, 207 N. Y. 17, 20, 100 N. E. 433, the Court of Appeals declared:

> "That the legislature has the authority to enact laws regulating the observance of the Sabbath day and to prevent its desecration is not, and cannot well be, disputed. The day is set apart by the statute for repose and for religious observance; objects which pertain to the physical and moral well being of the community. As to the acts which should be prohibited, as disturbances, or profanations, of the Sabbath day, the legislature is the sole judge."

Similarly in *People v. Moses*, 1893, 140 N. Y. 214, 215, this language appears:

> "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being

> of the people, and the peace, quiet and good order of society, has authority to regulate its observance, and prevent its desecration by any appropriate legislation is unquestioned."

See also *People v. Zimmerman*, 1905, 95 N. Y. S. 136. Finally, in the *Friedman* case itself, the opinion of the New York Court of Appeals, which was submitted to the Supreme Court for review, explicitly recognized the religious origin of the New York statute. 302 N. Y. at 79, 96 N. E. 2d at 186.

We find nothing in the cases discussing the Pennsylvania legislation and its background which makes any plainer the religious considerations which underlie the adoption of the "blue laws" of that state and from time to time have been utilized to justify them. The historical religious connection is so clear in both state statutes as to be obvious and indisputable. It has been stressed that the Supreme Court of Pennsylvania in upholding the local statute had gone so far as to say that "Christianity is part of the common law of Pennsylvania". *Commonwealth v. American Baseball Club of Philadelphia*, 1927, 290 Pa. 136, 138 Atl. 497, 499. But a New York case, *People v. Ruggles*, 1811, 8 Johns 290, went just as far.

Thus, the Supreme Court in the *Friedman* case was faced with very substantial indicia of the statute's relation to religion, strikingly similar to those appellant urges upon us now. We can see no basis for reasoning that the Pennsylvania statute is unconstitutionally related to an establishment of religion without bringing the New York statute under the same interdiction. Yet, the Supreme Court sustained the New York statute summarily. If the view of the establishment of religion question thus authoritatively established by the Supreme Court is to be changed it is for that Court, not an inferior court, to do so. Our conclusion that the *Friedman* case has broad and controlling significance on the issue of establishment of religion is contrary

to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market v. Gallagher*, D. Mass. 1959, 176 F. Supp. 466. That opinion disposes of this problem of controlling authority in a brief footnote which is not elaborate enough to make the court's reasoning clear to us. It affords no useful critique of our own analysis which indicates that the *Friedman* precedent is controlling.

As a separate point the plaintiff urges that the 1959 amendment is a denial of equal protection of the laws in that it unreasonably singles out certain types of retail selling for mandatory Sunday closing under heavy penalty—a hundred dollar fine, and twice that on subsequent offenses—while many other kinds of commercial activity are either permitted on Sunday or, if prohibited, subjected only to a very small fine, in most cases only four dollars.

This line of argument against Sunday closing statutes, no less than the First Amendment argument, has a considerable history of Supreme Court adjudication. Indeed, essentially the same argument was made against another provision of the Pennsylvania "blue laws" in *Commonwealth v. Grochowiak*, 1957, 184 Pa. Super. 522, 136 A. 2d 145. The Pennsylvania courts considered and rejected any argument that closing Sunday movies under a fifty dollar penalty while other worldly amusements and activities were permitted, or at least prohibited under the much smaller four dollar penalty, was arbitrary and unreasonable and a denial of equal protection of the laws. The case was taken to the Supreme Court where the appeal was dismissed for failure to present a substantial federal question. 358 U. S. 47. In *State v. Towery*, 1954, 239 N. C. 274, 79 S. E. 2d 513, appeal dismissed 347 U. S. 925, a Sunday seller of general merchandise complained that a North Carolina law prevented him from operating on Sunday yet allowed drug stores to remain open and to sell the same kinds of merchandise. The North Carolina courts sustained the statute and the Supreme Court dismissed the appeal. Similar summary dismissal has been the fate of other recent claims

of arbitrary classification and unreasonable discrimination in the selection of certain businesses and activities for Sunday closing while others, said to be no less objectionable, remained unmolested. *State v. Kidd*, 1957, 167 Ohio St. 521, 150 N. E. 2d 413, appeal dismissed 358 U. S. 132; *Gundaker Central Motors v. Gassert*, 1956, 23 N. J. 71, 127 A. 2d 566, appeal dismissed 354 U. S. 933; *State v. McGee*, 1953, 237 N. C. 633, 75 S. E. 2d 783, appeal dismissed 346 U. S. 802. This point was also involved in the *Friedman* case, which has already been discussed in relation to the establishment of religion issue. Indeed the Fourteenth Amendment argument of arbitrary classification seems to have been made as strongly there as was the First Amendment argument. See Pfeffer, CHURCH, STATE, AND FREEDOM, *supra*, 230-234, 239-240. The New York statute was attacked as a miscellany of pointless, irrational and discriminatory differentiations in the treatment of various Sunday commercial activities. But the Supreme Court was not persuaded that the contention had sufficient merit even to require full argument.

In larger context, cases arising under the Sunday closing laws are but a striking example of the continuing reluctance of the Supreme Court to interfere with even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations. *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 1955, 348 U. S. 483; *Kotch v. Board of River Port Pilot Commissioners*, 1947, 330 U. S. 552; *Tigner v. Texas*, 1940, 310 U. S. 141. But *cf. Morey v. Doud*, 1957, 354 U. S. 457. While *Morey v. Doud*, indicates that the Supreme Court will still strike down what it views as the most patently arbitrary of economic classifications we cannot ignore the fact that no Sunday law has seemed to the Court to raise even a substantial question in this area.

Moreover, in the case of the 1959 amendment of the Pennsylvania law, the circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action. In the present record it

appears and we find that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that of the plaintiff initiated and triggered new and rather large scale violations, and threats of others. It also appears in the testimony which is part of the legislative hearing on the bill which became the 1959 amendment of the Sunday closing law, that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute. It is probable that such considerations influenced the legislature's 1959 decision to make Sunday retail selling the subject of a new prohibitory enactment. In such circumstances we find it impossible to believe that the Supreme Court would treat this case as significantly different from those in which it has dismissed appeals for want of a substantial federal question.

Finally, it is argued that because the general prohibition in the 1939 statute against worldly activity on Sunday has for a long time not been enforced strictly or at all against many worldly Sunday activities, it is a denial of equal protection of the law to enforce the new 1959 prohibition against the Sunday retail sale of specified kinds of merchandise. On this point the evidence is clear and we find as a fact that in Lehigh County numerous commercial and recreational activities covered by the general prohibition of the 1939 statute have long been conducted openly on Sunday, and continue, without molestation or direction to desist by the defendant or by any public officer. On the other hand, beginning in 1957 and thereafter the defendant made substantial and frequent efforts by admonition and arrest to compel the Sunday closing of numer-

ous retail stores, including plaintiff's store. This court temporarily restrained the enforcement of the 1959 statute against the plaintiff within a week after its enactment. Since that time enforcement of the "blue laws" in Lehigh County has been held in abeyance. In these circumstances, the court finds no sufficient basis for a finding as to the future pattern or procedure of enforcement of the new statute if and when judicial restraint shall be removed. The impracticability of such an anticipatory finding is made the more obvious by the fact, of which we take judicial notice, that the term of office of the defendant as District Attorney expires at the end of the calendar year 1959. Thus, on the present record we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities. Is this such a discrimination as denies equal protection of the laws?

It may well be a violation of public duty under state law for local public officers to ignore widespread violations of the 1939 law. But it does not follow that the enforcement of the 1959 statute denies the Sunday selling retailer due process of law. The controlling constitutional principle is that such selective or discriminatory behavior by administrative officers, though wrongful, is not a violation of the Constitution unless equivalent action by the state legislature would be unconstitutional. *Snowden v. Hughes*, 1943, 321 U. S. 1; *Owensboro Waterworks Co. v. Owensboro*, 1906, 200 U. S. 38. See also *Hayman v. Galveston*, 1927, 273 U. S. 414, 416. In the situation we now are considering the administrative failure to enforce the 1939 law against certain types of Sunday activity creates a constitutional problem only to the extent that a legislative exemption of these activities from Sunday closing would do so. But we already have pointed out that the Supreme Court has repeatedly treated the fact that a Sunday closing law is a hodgepodge characterized by many and seemingly pointless exceptions and exemptions as insufficient to raise a sub-

stantial federal question. A hodgepodge in enforcement has no greater constitutional significance.[6]

On the whole case, while the court has jurisdiction of the parties and of the subject matter under Sections 1343 and 2281 of Title 28 of the United States Code, the plaintiff has failed to show any violation of the First or the Fourteenth Amendment of the Constitution of the United States. Accordingly, plaintiff is not entitled to relief in this action.

The factual statements and legal conclusions stated in this opinion shall constitute the findings of fact and conclusions of law of the court. An order may be presented dissolving the temporary injunction heretofore entered in this case. A final order and decree may be presented denying plaintiff relief.

The foregoing opinion, which has been approved by Judge Lord, is to be filed together with the separate opinion of Judge Welsh.

sgd. WILLIAM H. HASTIE,
Circuit Judge.

WELSH, *Senior District Judge*, concurring in part and dissenting in part.

It had been my hope after discussing this deep and fundamental problem with my Associates, to arrive at a completely unanimous conclusion. But a conscientious conception of Judicial duty, whether completely warranted or not, requires me to express myself in my own way on this subject.

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[6] In so ruling we in no way detract from the authority of the leading case of **Yick Wo v. Hopkins,** 1886, 118 U. S. 356, where the administrative discrimination practiced against Chinese entrepreneurs would have been no less invidious and constitutionally intolerable if directed by the legislature.

Let me say at the outset that this Court, individually and collectively, has sought to catch the spirit as well as the letter of the various arguments of all concerned. We are all in agreement on the original legislation including that of the Act of 1939. On this religious phase of the subject I can speak from personal experience. Having been born in the late seventies and having lived in an environment and atmosphere of reverence for the Sabbath until I reached my early manhood, I know whereof I speak. That legislation was the outgrowth of deep feelings of all but a microscopic minority. The framers of the Law had gone through a religious experience and a spiritual Renaissance that clearly set before them the evils of excessive worldly pleasures and unbridled seeking and striving for worldly riches. Their principal objective was to minimize the weakening of the spiritual life by too much worldly pleasures. Labor was secondary at that time, secondary, because of the simple habits and custom of the times. Most people did their own labor. There were very few employers having control over large numbers of men. And nearly all labor, such as it was, could be suspended for a day without confusion or without inconvenience to the community.

For over a hundred and fifty years the initial legislation has been on the Statute books. Times and customs have changed, due to the different conditions under which we live. To me it seems almost an entirely different world. It is but natural that great changes should bring about a clamor for modification or repeal of those inhibitions.

An appeal for relief has been made to the Court. Is that the proper Tribunal? After a Statute has been on the books for a hundred and fifty years or more should the Judicial Branch of the Government strike it down or should the appeal for relief be made to the Legislative Branch? Or to the people direct? Having served for many years in both the Judicial and Legislative Branches of the Government I cannot conceive that the Courts have power to make such a decision as we are asked to make in this case

by the plaintiff. In expressing this conclusion I do not want to be understood as not recognizing the increased demand for a change. Sometimes the advocates of the change speak rather harshly of the framers of those laws without an understanding of the motives that prompted their enactment. Often those who resist the repeal of this legislation today, are not entirely unsympathetic with the proponents of repeal. They know that in many respects the law has been a dead letter for many years. But countless thousands of fair minded Americans who truly love God and their neighbor, look upon these laws as something pointing to a spiritual ideal—unrealized it is true—but still an expression of a desire of a great Country and a great people to attain and reach for something higher than the flesh-pots of Egypt or the corroding gold of a Midas.

During the last half century they have seen the struggle against materialism become more and more fierce. They are now seeing mighty nations rising against each other with weapons of annihilation and destruction greater than Satan himself could devise. At home and abroad they see the misery inflicted, and their hearts are troubled. They still feel safer with a declaration of principle expressing hope for an ideal still on the books of this beloved Country. And in this global struggle they just do not want to throw the life preservers overboard to lighten the ship.

That is the way I read the feeling of our people. I am moved to say this in the hope that if both groups can see and feel what is on both sides of this question it will lead to a better understanding and a charitable goodwill on the part of all of us.

For these reasons I concur with the majority opinion in dismissing plaintiff's attack on all legislation prior to 1959.

In construing the Act of 1959 there are other considerations involved. It is frankly admitted by the sponsors of the Act that there is nothing of a religious character or element in the legislation. One can therefore fairly ask, why then should it be tacked on to an Act that was conceived

and cradled in religiosity, if not in religion? The amending Act actually is one to regulate business and to deal with the competition among business men. Such far reaching efforts to regulate the private lives of others should be bottomed on a firm Constitutional foundation, and the need, the necessity, and the evil to be controlled, fully met. We ask: Is it based on public health, public security, public morals, sanitation, water supply, education, or any of the factors that would, standing by themselves be admittedly a basis for the power of the legislature to enact.

I do not want to go over the ground so thoroughly covered by my Associates but I do not find that the legislation has met the test on any of these requirements. We all admit that under our form of Government there are things that the legislature cannot do. The fundamental rights of the people have never been at the unrestricted mercy of a possible unreasonable and arbitrary legislature. MOREY *v.* DOUD, 354 U. S. 457. And in determining whether or not the legislature has kept within the legitimate bounds it is proper for the Courts in construing legislative action to ask these very pertinent questions as stated above.

It is also the duty of the Court to take into consideration the various facts that mark the introduction of the legislation and the events leading up to such introduction. I do not think anyone will seriously argue that there is such a rising tide of spiritual interest in Sunday's observance as to constitute a clamor for more stringent laws to insure the sanctity of the Christian Sabbath. The trend has been quite the reverse. Therefore, why this sudden eruption of Sabbath interest? All the facts leading up to the introduction of this Statute appear in the record and without desiring to be critical they are not particularly wholesome or praiseworthy. (This is no reflection on the County Officials.) High pressured salesmanship, outstanding organizing ability, a fantastic list of prohibited activity, indicate that a single target was the objective and a single purpose to regulate business competition. In addition it was enacted a few months before a highly important State election when

members of the legislature from various parts of the State were put to undue and unreasonable pressure to vote for this legislation, that they would not think of supporting if it was not connected with the Sunday closing. The proponents of the legislation admit this was a helpful feature in getting it passed.

If it is conceded that this legislation is within the power of the legislature to enact, then I cannot conceive of any future legislation that cannot also be passed. We know that far-sighted men are considering the advisability of the four day working week, due to automation and the fear of unemployment. If this Act lies within the power of the legislature to enact, it will be establishing a precedent for drastic curtailment of the right to work in the future.

It is not like the daylight saving legislation, couched in the language of a recommendation or request, but in the language of a command subject to drastic penalty for violation.

This view is entirely too far to the left for me to say that the legislative branch has any such power without a specific grant of authority from the people. I would strike it down.

Sgd. GEO. A. WELSH.

SUPPLEMENTARY FINDINGS OF FACT.

[Filed Dec. 7, 1959]

Present: HASTIE, *Circuit Judge*, WELSH, *Senior District Judge* and LORD, *District Judge*.

Pursuant to the request of plaintiff the court makes the following findings of fact in addition to those already made and stated in the course of the opinion of the court:

1. Sunday is a day designated for religious services and observances by Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day.

3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of wordly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of July 2, 1935, P. L. 599, 4 *Purd. Stat.* §§59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if the voters of the municipality so vote by referendum. Act of April 25, 1933, P. L. 74, 4 *Purd. Stat.* §§81-87; to

stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 *Purd. Stat.* §§121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 *Purd. Stat.* §§151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 *Purd. Stat.* §§181-185, provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, §1, as amended, 30 *Purd. Stat.* §265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, §702, as amended, 34 *Purd. Stat.* §1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, §406, as amended, 47 *Purd. Stat.* §4-406 (pp. 71-72).

4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 *Purd. Stat.* §4651, 4 *Purd. Stat.* §82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 *Purd. Stat.* §§152, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the first Sunday and $200 thereafter, 4 *Purd. Stat.* §4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner, it is $100 for each sale at retail, but only $4.00 at wholesale. Sale of slip covers for automobile seats all day Sunday entails a $4.00 fine; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter.

and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

5. The Commonwealth of Pennsylvania has enacted a pattern of economic laws under the police power regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, §3, as amended, 43 *Purd. Stat.* §103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended, 43 *Purd. Stat.* §46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, §1, 43 *Purd. Stat.* §361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, §1, 43 *Purd. Stat.* §481 (employees of motion picture theaters must be given one day of rest per week).

6. The enforcement of the Sunday laws against plaintiff's employees, as threatened by defendant, will cause them not to work on Sundays. This will require plaintiff to close its store on Sunday, which is likely to render its entire operation unprofitable.

7. Unless enjoined, defendant will enforce the 1959 statute against plaintiff's employees, thereby causing plaintiff to suffer irreparable harm.

/s/ WILLIAM H. HASTIE,
Circuit Judge.

/s/ GEO. A. WELSH,
Senior District Judge.

/s/ JOHN W. LORD, JR.,
District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959 No. 67

Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman,
Appellants,

v.

Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, and Victor H. Blanc, District Attorney of the City of Philadelphia,

and

Pennsylvania Retailers' Association, Intervening Defendant,
Appellees.

On Appeal from the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 *et seq.*

MEMORANDUM IN SUPPORT OF JURISDICTION AND CONSOLIDATION

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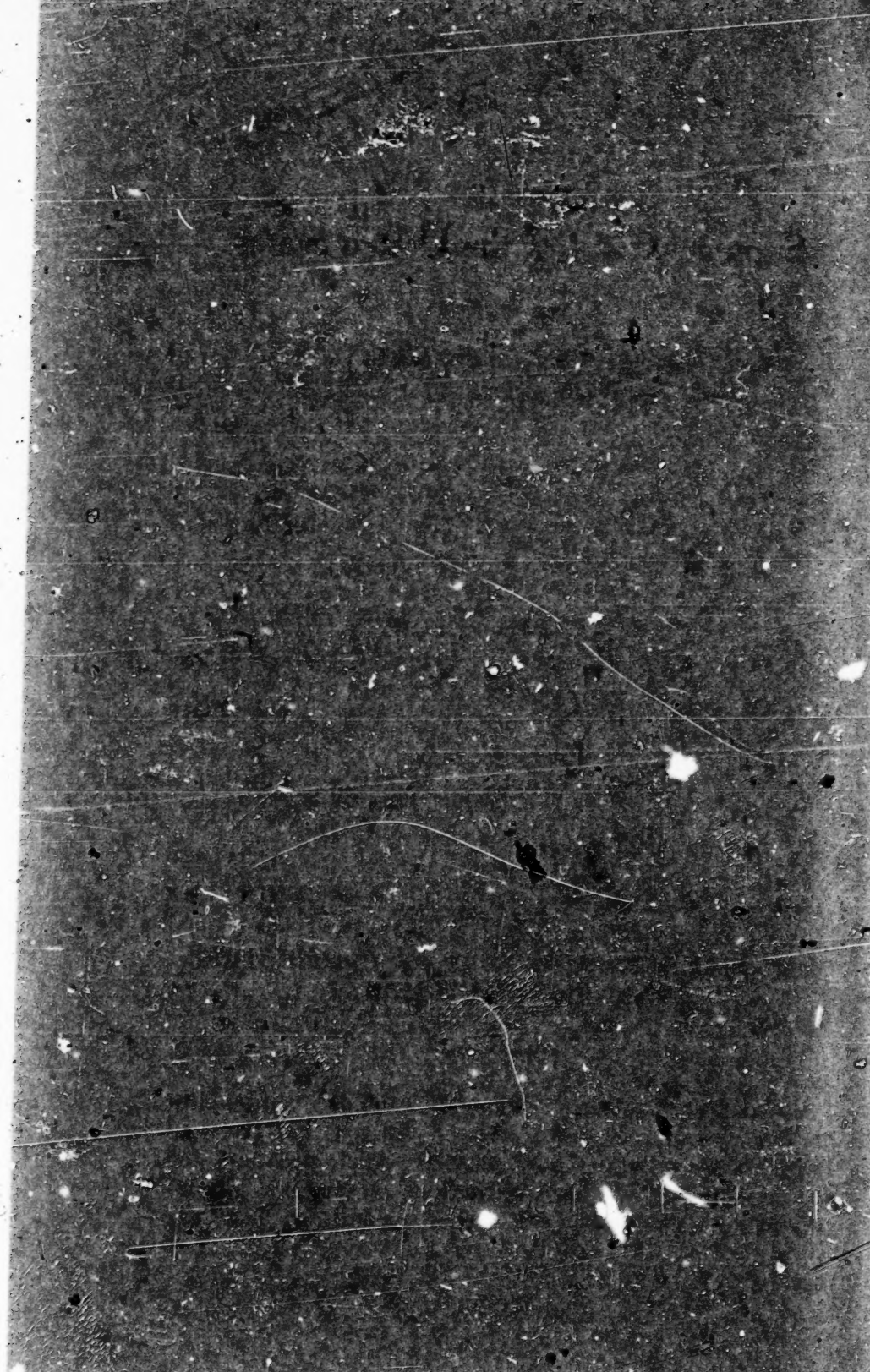

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959. No. 845.

Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman,
Appellants,

v.

Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, and Victor H. Blanc, District Attorney of the City of Philadelphia,

and

Pennsylvania Retailers' Association, Intervening Defendant,
Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION AND CONSOLIDATION.

This case involves a challenge to the constitutionality of Pennsylvania Act No. 212 of August 10, 1959, 18 Purdon's Pa. Stats. Ann. § 4699.10, which prohibits the sale at retail of certain commodities on Sunday. Plaintiffs are merchants who sell such commodities. They are

also Orthodox Jews who, in accordance with the precepts of their religion, close their business establishments on the Jewish Sabbath.

Upon motion filed at the hearing on plaintiffs' motion for a temporary restraining order, Pennsylvania Retailers' Association was granted leave by the three-judge District Court to intervene as a party defendant in this action. The Association participated in the trial of the action, filed briefs and presented oral argument.

On April 25, 1960, this Court noted probable jurisdiction in three other cases involving Sunday laws:

> No. 438, *McGowan* v. *Maryland;*
>
> No. 532, *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.;*
>
> No. 699, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley.*

Pennsylvania Retailers' Association asserts that the final order of the three-court judge court filed on December 16, 1959 dismissing plaintiffs' amended complaint in the present action should be affirmed. However, in view of this Court's action in noting probable jurisdiction in the three cases cited above, the Association does not oppose the granting of the appeal here. To the contrary, the Association hereby urges the Court to note probable jurisdiction and respectfully requests the Court to list this case for argument together with Nos. 438, 532 and 699, so that a complete consideration of all of the relevant issues with regard to Sunday laws may be had at the same time.

In support of its position, Pennsylvania Retailers' Association submits that, on the basis of the allegations of plaintiffs' amended complaint, the present case involves issues which will not necessarily be disposed of by this Court's decisions in the three Sunday law cases above cited in which probable jurisdiction has been noted.

The present action is the only Sunday law case before this Court which squarely raises the economic

impact of Sunday selling laws upon Orthodox Judaism. Plaintiffs sell merchandise which is totally devoid of any religious connotation, namely, wearing apparel and home furnishings." (Jurisdictional Statement, p. 6). Their competitors enjoy their greatest volume of business during the Jewish Sabbath when plaintiffs are closed. (Jurisdictional Statement, p. 7).

By contrast, in the case of the supermarket involved in the Massachusetts appeal, No. 532, "all of its meats and meat products are kosher, and something like 95 per cent of the rest of its stock is kosher." 176 F. Supp. 466, 469. "A very substantial percentage of the corporate plaintiff's customers are Orthodox Jews, and most of the others are Conservative Jews who observe the Jewish Sabbath." *Ibid.* Most of Crown Kosher's customers, unlike those of the present plaintiffs, will not patronize someone else on the Jewish Sabbath; and Crown Kosher's products will have little, if any, attraction for non-Jewish shoppers. Thus the basic question in No. 532 is the inconvenience to Jews who strictly observe the Sabbath and also are not permitted to buy and sell on Sundays, as opposed to the actual loss of business alleged in the present action.

Both the other two appeals, Nos. 438 and 699, involve Sunday sales by affiliated corporations which can have no religious connections whatsoever and operate seven days a week. Moreover, in those cases, the standing of the parties to raise constitutional questions with regard to religious freedom is at least highly questionable. See the opinion of the District Court in No. 532 with regard to the corporate plaintiff there. 176 F. Supp. 466, 472.

While No. 532 and the present case both involve individual plaintiffs who clearly have standing to raise the religious constitutional issues, there are nonetheless significant differences between those two cases other than the one previously mentioned. No. 532 involves an old law of general application as to which the religious background was found by the District Court to be clear. The

present action concerns an enactment of the Pennsylvania legislature in 1959 as to which there is no such background and no equivalent finding by the District Court. The 1959 Pennsylvania Act is directed solely at Sunday retail selling, which selling the Pennsylvania legislature presumably found to be contrary to the public welfare. (Jurisdictional Statement, pp. 29-30.)

Moreover, the statute involved in No. 532 allegedly discriminates among different types of persons selling food. The Pennsylvania statute, to the contrary, treats all individuals who sell the subject commodities at retail in the same fashion. It is thus possible that this Court could decide No. 532 in favor of the plaintiffs on grounds of improper classification without reaching the religious constitutional issues. In the present action, the lack of discrimination between sellers of the same commodities could consistently be upheld so that the religious issues would have to be faced squarely.

For the above reasons, while asserting that the District Court's dismissal of plaintiffs' amended complaint should be affirmed, Pennsylvania Retailers' Association respectfully urges this Court to note probable jurisdiction in the present action and to list the case for argument together with Nos. 532, 438 and 699.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1960.
No. 67.

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. 2281 ET SEQ.

Appellants' Brief

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I.

OPINIONS DELIVERED IN COURT BELOW.

No opinion was written by the three-judge District Court which dismissed appellants' Amended Complaint. The Final Order (R. 18, 19) cites as authority the opinion in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959); Jurisdictional Statement, Appendix B, p. 18 et seq.

II.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

The jurisdiction of this Court is invoked under 28 U. S. C. §1253 and 2281 *et seq.*, the appeal being from a Final Order (entered on December 16, 1959) of a three-judge District Court which refused a permanent injunction, sought by appellants on the ground that the state statute hereinafter referred to conflicted with the United States Constitution, and dismissed their Complaint. *Query v. United States*, 316 U. S. 486, 490-91 (1942).

The Notice of Appeal to this Court (R. 19, 20, 21) was filed on February 11, 1960, in the United States District Court for the Eastern District of Pennsylvania. A Jurisdictional Statement was filed, and probable jurisdiction was noted on May 23, 1960.

III.

STATUTES INVOLVED.

This litigation involves the validity of the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, 18 Purd. Pa. Stat. Ann. §4699.10 (supp.), which provides:

> "Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> "Each separate sale or offer to sell shall constitute a separate offense . . ."

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States, including the Equal Protection and Due Process clauses of the latter Amendment. The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

QUESTIONS PRESENTED.

1. Whether the enforcement of the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, against retailers whose religion forbids them from engaging in work and commercial activity, personally or through others, on Friday evening and Saturday, and who are in competition with other retailers who operate their businesses on Friday evening and Saturday, *interferes with their free exercise of religion, and hinders Orthodox Judaism in its ability to compete for adherents with other sects*, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, where the loss of business resulting from such enforcement will put such retailers to the choice of either giving up their faith, or

(a) substantially reducing their ability to earn a livelihood (in the case of four of the appellants), or

(b) going out of business and losing a substantial

capital investment (in the case of one of the appellants).

2. Whether the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, and the enforcement thereof, violate the proscription against an establishment of religion in the due process clause of the Fourteenth Amendment to the United States Constitution by preferring certain religious sects and by protecting certain religious sects without offering the same protection to other religious sects.

3. Whether the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, is arbitrarily selective in the commodities and businesses affected in violation of the equal protection or due process clause of the Fourteenth Amendment to the United States Constitution.

V.

STATEMENT OF THE CASE.

Appellants, plaintiffs below, instituted a suit seeking a permanent injunction restraining the enforcement of the Pennsylvania Act of August 10, 1959, P. L. 660, 18 Purd. Pa. Stat. Ann. §4699.10 (supp.), hereinbefore set forth.

The court below was convened pursuant to section 2281 *et seq.* of Title 28, U. S. C. A Motion to Dismiss was filed and a Consent Decree, temporarily restraining enforcement of the Act, was entered. On December 7, 1959 the Complaint was dismissed and the Temporary Restraining Order was dissolved. On December 10, 1959 permission to file an Amended Complaint was granted, and such a Complaint was thereafter filed by appellants.

Their Amended Complaint (R. 12-16) alleged in part that:

"* * *

"5. Each of the aforesaid plaintiffs is the owner and operator of a store within the City of Philadelphia which sells at retail certain goods, specifically: Abraham Braunfeld owns and operates a retail store at 327 South Street at which he sells clothing and wearing apparel for children; plaintiff Isaac Friedman owns and operates a retail store at 759 South 4th Street at which he sells home furnishings, to wit, draperies and slip-covers; Alter Diament owns and operates a retail store at 763 South 4th Street at which he sells home furnishings, to wit, draperies and slipcovers; S. David Friedman and Joseph R. Friedman own and operate a retail store at 2247 E. Williams Street at which they sell wearing apparel, to wit, shoes.

"* * *

"8. Each of the plaintiffs herein is an observant and Orthodox member and adherent of the Jewish faith. The laws of said faith, particularly the Fourth Commandment of the Decalogue, require a total abstention from business and all manner of work from nightfall Friday until nightfall Saturday each week, this period constituting the Sabbath of the Jewish religion; and forbid its adherents to hire other employees regardless of the faith of such employees, to work during this same period.

"9. The foregoing religious requirement of Sabbath observance occupies a central and primary position in the scheme of religious observances of Orthodox Judaism, and one who does not observe the Sabbath in the manner set forth cannot be an Orthodox Jew.

"10. Each of the plaintiffs herein always has abstained, and at the present time continues to abstain from business and all manner of work on the said Jewish Sabbath and keeps his store regularly closed during that period.

"* * *

"12. The plaintiffs have heretofore kept their places of business open on Sunday. If they continue to do so, they will subject themselves to prosecution under the said statute, unless such prosecution is enjoined by this Court and the statute is declared unconstitutional.

"13. In the general business area in which the plaintiffs do business, the night and day which the plaintiffs voluntarily stay closed because of their religious convictions, to wit, Friday night and Saturday, are the night and day of the week on which the greatest volume of business is done by plaintiffs' competitors.

"14. The volume of business which each of the plaintiffs does on Sunday is substantially less than the volume of business which each of the plaintiffs would do if he stayed open on Saturday or on Friday night and Saturday.

"15. Each of the plaintiffs does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sundays.

"16. Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment."

Plaintiffs averred (R. 15, 16) that the Act violated the United States Constitution in the particulars set forth hereinbefore (see Questions Presented).

Appellees, defendants below, moved to dismiss the Amended Complaint (R. 18) on the grounds that (a) no substantial federal question was presented; (b) no claim was stated against defendants upon which relief could be granted; and (c) the Act was constitutional on its face.

On December 16, 1959, the three-judge statutory District Court below dismissed the Amended Complaint, and held that the instant case came within the legal ruling in *Two*

Guys from Harrison-Allentown, Inc. v. McGinley, 179 F. Supp. 944 (E. D. Pa. 1959), decided on December 1, 1959 by another statutory court of the same district (R. 18, 19).

VI.

SUMMARY OF ARGUMENT.

Appellants are Orthodox Jews. They observe strictly the injunction against Sabbath labor set forth in the Fourth Commandment of the Decalogue, and this observance is essential to their continued existence as Orthodox Jews, and for the survival of Orthodox Judaism **(pp. 10-14)**.

Even if the Pennsylvania Act be viewed as purely secular legislation, its enforcement will nonetheless restrict appellants' religious freedom. They are retailers who have been able to support themselves and their families modestly, even though their religion compels them to stop operations on what have become in our society the best shopping evening and shopping day—Friday evening and Saturday. Enforcement of the statute will require them either to operate on a four and one-half day week—the least remunerative four and one-half business days of the week—or to give up their faith. At least one of them will not be able to survive in business if the statute is enforced against him (R. 15), and if he continues to observe the Sabbath. Thus, enforcement of the statute becomes an instrument of economic compulsion to abandon religious faith **(pp. 14-18)**.

Further, enforcement of the statute will severely handicap Orthodox Judaism in its ability to compete fairly for adherents with other religions and sects **(p. 16)**.

The statute is not attended by the usual presumption of constitutionality. Because its enforcement is an instrument

tending to compel religious abandonment, it must be judged by the "clear and present danger" standard. *Thornhill v. Alabama*, 310 U. S. 88 (1940). Furthermore, because it restricts the liberty of a small, discrete religious minority, unable to protect its interests through the normal political processes, it must receive especially exacting judicial scrutiny. *United States v. Carolene Products Co.*, 304 U. S. 144, 152, note 4 (1938); *Minersville School District v. Gobitis*, 310 U. S. 586, 605, 606 (1940) (Justice Stone, dissenting) **(pp. 18-22)**.

The legislation cannot be justified by the need for rest. There are many alternative ways of assuring rest that do not entail restrictions on religious liberty. Pennsylvania has in the past enacted true "day of rest" statutes, requiring certain persons to rest one day or one and a half days in every seven. The need for rest cannot be equated with a need for a uniform day of rest **(pp. 22-24)**.

The rationale that the entire community should be at rest on the same day so that competition and economic warfare can stop cannot justify such legislation. Sunday operations by such a small number of persons do not present our society with the kind of "clear and present danger" which this Court has required in the past to sustain legislation affecting religious freedom. Indeed, it is this very lack of danger to society which accounts for the fact that Sabbatarian groups have been exempted from closing laws in many states. The dangers of polygamy, or refusal to permit immunization against disease, or child labor—dangers which have justified restrictions on religious liberty—are strikingly absent in the case at bar **(pp. 24-29)**.

Furthermore, the desire for an entire community at rest on the same day is at war with the ideals and aspirations of a culturally diverse people. It is certainly not such a socially desirable result that it may constitutionally be achieved at the expense of cultural plurality. Sunday business has developed among Sabbatarians as a cultural manifestation of their efforts to support their families without sacrificing sacred beliefs **(pp. 29, 30)**.

In other contexts, this Court has struck down legislation the primary purpose of which was to unify or standardize the people. Thus, requiring all children to go to public schools, *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), and outlawing the teaching of foreign languages to young children, *Meyer v. Nebraska*, 262 U. S. 390 (1923), have been declared unconstitutional. Even "national unity" as the basis of "national security" has been outlawed where the means for obtaining national unity have been statutory compulsion. *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U. S. 624 (1943) **(pp. 30-32)**.

B. The Pennsylvania Act under consideration protects and prefers Christianity and, therefore, violates the proscription against the establishment of religion contained in the First and Fourteenth Amendments. The Act is but one in an entire complex of blue law legislation in the Commonwealth of Pennsylvania and must be viewed as such. The underlying law is on its face Christian legislation and in every Pennsylvania decision for the past century has been so regarded. The fact that the instant statute was drafted in purely secular terms cannot change its character. Careful phraseology does not camouflage the fact that all the latter day rationalizations for blue law legislation—the need for rest, for uniformity of enforcement, for community repose—have been conceived to save legislation, the real and obvious and heretofore admitted purpose for which is the protection and preference of Christianity.

This Court has said:

> "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion'. * * * If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" *McCollum v. Board of Education*, 333 U. S. 203, 232 (1948).

This legislation resulted from a Church-State combination proscribed by the First Amendment **(pp. 32-40)**.

VII.

ARGUMENT.

A. Enforcement of the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, §1 against the Orthodox Jewish appellants interferes with their free exercise of religion and hinders Orthodox Judaism in its ability to compete for adherents with other sects, in violation of the First and the Due Process Clause of the Fourteenth Amendments to the United States Constitution.

1. *Strict Sabbath observance is at the core of, and is inseparable from, Orthodox Judaism.*

The argument in the next succeeding section of this brief is that enforcement of the Pennsylvania Amendatory Act will tend to compel Orthodox Jews to abandon Sabbath observance, which to them is the equivalent of abandoning their faith. To reach that point, appellants' counsel must first establish the cardinal importance of the Sabbath institution to Orthodox Judaism, but do not wish to lengthen unduly this brief with an essentially non-legal exposition. A few brief remarks concerning that subject will, therefore, be set forth in the text of the brief, with supporting data appearing in the footnotes.

The scriptural source of the Sabbath institution is Exodus 20:8-11, setting forth the Fourth Commandment as follows:

> "Remember the sabbath, to keep it holy. Six days shalt thou labor, and do all thy work; but the seventh day is a sabbath unto the Lord thy God, in it thou shalt not do any manner of work, thou, nor thy son,

nor thy daughter, nor thy man-servant, nor thy maid-servant, nor thy cattle, nor thy stranger that is within thy gates; for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested on the seventh day; wherefore the Lord blessed the sabbath day, and hallowed it" [THE HOLY SCRIPTURES (The Jewish Publication Society of America, 1917)].

Another version of the same Commandment is found in Deut. 5:12-15. The underlying principles regarding working on the Sabbath will be found in Gen. 2:1-3; Exod. 16:22-30; Exod. 31:12-17; Exod. 21:13-17; Exod. 34:21; see also, Isa. 58:13, 14; Amos 8:4-6; Jerem. 17:21, 22.

To the Orthodox Jew, the Fourth Commandment was revealed by God to Moses at Mount Sinai. To all, the great antiquity of the Sabbath idea is beyond dispute.[1]

From the days of the Decalogue at least, the Sabbath has been of enormous and undiminished importance to Judaism.[2] Traditional Jews have by their actions—even by giving up their lives[3]—demonstrated their belief that they "must

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[1] Authorities differ as to the age of the Sabbath idea, some believing it was sponsored by Moses, and others that it does not predate the Babylonian exile (596 B. C.). See **Encyc. Brit.**, Vol. 19, **Sabbath**, pp. 787-789 (1950).

[2] For brief, authoritative exposition on the cardinal importance of the Sabbath in Jewish life, past and present, the Court is referred to **George Foot Moore, Judaism in the First Centuries of the Christian Era**, Vol. 2, pp. 21-39 (Harv. Univ. Press, 1954); **The Babylonian Talmud, Seder Mo'ed, Shabbath**, Vol. 1, Foreword by Dr. J. H. Hertz, xiii-xv; Introduction by I. Epstein, xxi-xxvi (The Soncino Press, 1938); **Gaster, Festivals of the Jewish Year**, pp. 263-290 (Sloane, N. Y. 1952). Encyclopedia Britannica notes (Id., p. 787) that the Fourth Commandment follows immediately upon the commandments which are concerned with God's name indicating, in the words of the contributor, ". . . how great must have been the importance of the Sabbath . . . The emphasis on the Sabbath in this form of the Decalogue is the more noteworthy in view of the fact that it ignores all the other feasts and rites."

[3] Antiochus Epiphanes sought to abolish the Sabbath, and the Jews at the beginning of the Maccabean revolt allowed themselves to be massacred in cold blood rather than profane the Sabbath—even in self-defense (**Moore, op. cit., supra**, note 2, at 26). Afterwards, the leaders

observe the Sabbath throughout their generations, for a perpetual covenant" (Exod. 31:16).

One of the great Jewish scholars of recent times has said that, "Without the observance of the Sabbath, of the olden Sabbath, of the Sabbath as perfected by the Rabbis, the whole of Jewish life would in time disappear."[4] The material collected in the notes below points up the generally accepted belief among traditional Jews for the past several millenia that the survival of Judaism is inextricably bound up with the continued virility of the Sabbath institution.[5] These age-old and modern authorities form the basis for the appellants' averment that "The . . . religious requirement of Sabbath observance occupies a central and primary position in the scheme of religious observances of Orthodox Judaism, and one who does not observe the Sabbath in the manner set forth cannot be an Orthodox Jew" (R. 14).

The Sabbath and its relationship to the destiny of Israel have been steeped in mystical concepts of a religious nature

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in Israel decided to recognize defensive warfare as permissible on the Sabbath. (**Segal, The Sabbath Book,** pp. 108, 206, 207, Thomas Yoseloff, 1957). And at a later date the tenacity of the Jews' grip on the Sabbath compelled the Romans to exempt them from military service [**Encyc. Brit.,** Vol. 19, **Sabbath,** pp. 787-789 (1950); **Josephus Antiquities of the Jews,** Book xiv, Ch. x, §§11-19 (J. Grigg, Phila. 1829).

[4] Dr. J. H. Hertz, the late Chief Rabbi of England, in his commentaries to **The Pentateuch and Haftorahs** p. 298 (Soncino Press, 1952).

[5] Achad Ha'am, 19th century Jewish writer: "Far more than Israel has kept the Sabbath, it is the Sabbath that has kept Israel." Quoted by Dr. Hertz in his commentaries to **The Authorized Daily Prayer Book (Rev. ed.),** p. 341 (Bloch Publ. Co., 1948).

Maimonides: "The institution of the Sabbath and the prohibition against idolatry are each equal in importance to all the other laws of the Torah. . . . The Sabbath is also a sign between the Holy One, blessed be He! and us forever." **Jewish Encyc.,** Vol. 10, **Sabbath,** p. 598 (Funk & Wagnalls Co., 1905).

Abraham Joshua Heschel, modern Jewish scholar: "There are few ideas in the world of thought which contain so much spiritual power as the idea of the Sabbath. Aeons hence, when of many of our cherished theories only shreds will remain, that cosmic tapestry will continue to shine. Eternity utters a day." **Heschel, The Sabbath,** p. 101 (c. 1951).

And see authorities cited in note 2.

from the earliest times until today.[6] It has been and is, despite its many restrictions, a day of great joy, lifting the Jew out of his environment, which in some times and places has been hostile in the extreme, and transforming him from his frequently degraded condition to princely state for a fleeting day.[7]

The footnoted material will make clear, too, that there is no real relationship between the Jews' Sabbath and the Christians' Sunday. While the latter arose out of the former, they are not the same either in conception or in manner of observance. "Paul from the first days of Gentile Christianity, laid it down definitely that the Jewish Sab-

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[6] For example, in Jewish legend the Sabbath is Israel's bride, and in the sixteenth century in Safed, Palestine, the Jews in the community would dress in white on Friday evening and walk **en masse** to the outskirts of the city, to welcome her. **Grayzel, A History of the Jews,** p. 471 (Jewish Publ. Soc., 1956). To this day, every Jew who worships on Friday evening repeats over and over again the words, "Come, my friend, to meet the bride. Let us welcome the presence of the Sabbath." **The Authorized Daily Prayer Book (Rev. ed.),** pp. 356-359 (Bloch Publ. Co., 1948).

[7] Dr. Hertz, in his Foreword to the Shabbath tractate of the Babylonian Talmud, **op. cit., supra,** note 2, at p. xv, quotes German Protestant theologian R. Kittel as follows:

> "Anyone who has had the opportunity of knowing in our own day the inner life of Jewish families that observe the Law of the fathers with sincere piety and in all strictness, will have been astonished at the wealth of joyfulness, gratitude and sunshine, undreamt of by the outsider, with which the Law animates the Jewish home. The whole household rejoices on the Sabbath, which they celebrate with rare satisfaction not only as the day of rest, but rather as the day of rejoicing. Jewish prayers term the Sabbath a 'joy of the soul' to him who hallows it: he 'enjoys the abundance of Thy goodness.' Such expressions are not mere words; they are the outcome of pure and genuine happiness and enthusiasm."

On the Sabbath the Jew worships and rejoices, is instructed, teaches his children, blesses his children, praises his wife with the beautiful eulogy of the model housewife from **Proverbs** 31:10-31. See **Moore, op. cit., supra,** note 2, at pp. 34-39.

See poem "Princess Sabbath" by Heinrich Heine; **Silver, Where Judaism Differed,** p. 92 (Jewish Publ. Soc., 1957).

bath was not binding on Christians."[8] Sunday became the Lord's Day in Christianity, a day set apart for worship in memory of the Resurrection.[9]

2. *Enforcement of the Act will tend to compel abandonment of Sabbath observance and, consequently, Orthodox Judaism by appellants and those similarly situated.*

The special vice of the statute now before the Court is the choice it puts to the Sabbatarian businessman: To give up his Sabbath observance and thus his faith or to go out of business or, at least, suffer serious economic loss. And it is the statute, not appellants' religion, which is the cause of this dilemma; for until now appellants and those of similar religious persuasion have been able to keep their faith *and* survive in the business world, despite the coincidence that their evening and day of rest and our society's best shopping evening and day are the same. There may be increasing pressures toward social conformity, but our still complex, culturally pluralistic people have always been able to accommodate the persevering Sabbatarian. *It is statutory compulsion—the power of government*—that makes the difference. Sunday—in any event, not comparable to Saturday as a business day—has until now offered appellants an opportunity to make up for part of the enormous business loss strict Sabbath observance entails. But the Pennsylvania Act denies them this opportunity, and they are left with not a single hour of week-end time within which to conduct business. It is a fact that the Sabbath observer whose trade brings him within the proscription of the Pennsylvania Act is able to conduct his retail business only from Monday morning until mid-

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[8] **Encyc. Brit.**, Vol. 19, **Sabbath**, pp. 787-789 (1950).

[9] Id., Vol. 21, **Sunday**, p. 565.

afternoon on Friday.[10] And a retail businessman cannot realistically be expected to operate profitably on a four and one-half day week, when the other two and one-half days happen to be the entire week-end. Appellants do not go to their customers. They must wait for customers to come to them. And to customers in our society, week-ends have become prime shopping time.

The competitive disadvantage to Sabbath observers inherent in the statute is especially great—probably fatal—for these appellants. For they are not in trades catering exclusively to Jewish customers, such as were the kosher butchers in *Friedman v. New York*, 341 U. S. 907 (1951), whose competitors likewise closed on the Jewish Sabbath. These appellants sell children's clothing, shoes, draperies and slip covers, *in open and immediate competition with others who operate on Friday night and Saturday* (R. 14, 15). It is fair to assume that if the appellants are compelled to close also on Sunday, most of their Sunday customers will buy elsewhere on Friday night or Saturday.

Thus, one of the appellants will go out of business if the statute is enforced against him (R. 15) and if he chooses to hold to his faith, and the others will sustain serious economic loss over and above that which they voluntarily assumed by remaining faithful to their religious obligations. Counsel has no way of knowing what percentage of Sabbatarians situated like appellants would continue to suffer the economic loss and what percentage would instead quietly give up the faith that until now has been theirs. But the pressure, the compulsion, is there.

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[10] The requirement of ceasing activities of labor well before the actual time that the sun sets on Friday is an outgrowth of the Jewish doctrine of "building a fence around the Torah." Illustratively, the traditional Jew "adds from the non-holy to the holy" in connection with the sacred days of the calendar; i. e., work is suspended before the actual time that the Sabbath commences so as not to inadvertently encroach upon the sanctity of that day. In addition to the foregoing is the practical requirement of leaving business early so as to be able to prepare for synagogue attendance at sundown. See **The Babylonian Talmud, Seder Mo'ed, Rosh Hashanah** 9a (Soncino Press, 1938).

The economic loss is the instrument of compulsion, for the extent of the loss involved in having to give up what to them is the only non-sacred time of the week-end determines the degree of compulsion to abandon their faith. Faced with such economic loss or ruin, how many will persevere? *How many will begin to operate on what once was their sacred Sabbath?*

The problem must also be considered from the point of view of the organized Orthodox Jewish faith or of the other Sabbatarian faiths. A religious group has a right to "flourish according to the zeal of its adherents and the appeal of its dogma . . . The government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 342 U. S. 313, 314 (1952). This is at the essence of the religious freedom in our land—free competition between sects. The majority of sects observe Sunday; others, in direct competition with them for adherents, observe Saturday. More important to the instant case, Orthodox Judaism is in a highly competitive, albeit friendly, struggle for adherents with other branches of the Jewish faith[11] to whom this form of Sabbath observance is not so central. Even assuming that some proponents of the legislation in question were not attempting to protect Christianity in pressing for Sunday closings, the end result is the same—the competition is no longer free or fair. When only Sabbatarians are compelled to observe a *separate* secular day of rest, are the Sabbatarian faiths being permitted to flourish in accordance with the zeal of their adherents and the appeal of their dogma? Quite clearly the statute will seriously hamper Orthodox Judaism in its efforts to win new adherents and maintain old ones.

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[11] In 1948 it was said that, "No Figures exist as to the number of . . . individuals in the United States belonging to each of the four principal groups of Jewry, i. e. Orthodoxy, Reform, Conservative Judaism, and Reconstructionism." **Universal Jew. Encyc.**, Vol. 6, p. 246 (N. Y. 1948). But see **Mead, Handbook of Denominations**, Reform Judaism, p. 122 (Abingdon Pr., 1956) (Reform Judaism claims one million adherents as against two million each for Orthodox and Conservative Judaism).

But it is argued that the statute does not compel a Jew to work on the Sabbath but merely forbids him from working on Sunday. Only statutes which *directly* interfere with religion, it is said, are proscribed by our Constitution.

Concerning religious freedom, Justice Murphy said, "Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches." *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U. S. 624, 645 (1943). The distinction appellees seek to make between direct and consequential limitations on religious freedom has neither the clarity nor the unsophistication of a lasting Constitutional principle.

Ultimately, a statute's consonance with religious freedom can be measured only one way: By the degree of voluntarism, of freedom, in religious choice before and after the statute. Does this statute make it likely that some Sabbatarian businessmen will abandon their Sabbath observance and thus their faith?

In *Follett v. Town of McCormick*, 321 U. S. 573 (1944), this Court struck down an ordinance requiring a $15.00 per annum license fee of agents selling books, as applied to a Jehovah's Witness. In that case, the community imposed a tax *upon all businesses and professions* and, once paid, *there was absolutely no discretion in any governmental agency or personnel to withhold the license.* Thus, there was no attempt to single out any religious group, nor did the legislation leave open the door of administrative abuse.

Which of the two statutes, the *Follett* case statute or the instant one, more effectively limits religious choice or voluntarism? Indeed, ordinances like those in the *Follett* case, *supra*, are struck down not because they tend to compel anyone to give up his faith—they clearly do not—but because even though a $15.00 tax may contain no such compulsion, a $1,000.00 tax does, and the difference is only in degree. But this is not a statute which contains the seed of future possible compulsion; rather it will effect an immediate compulsion. The choice of going out of business or

giving up their faith will face Sabbatarian business men as soon as enforcement of the new law begins.

Thus the competitive disadvantage worked by the statute demands of them a decision both ends of which are inconsistent with freedom. And in broader terms, the rules of fair competition for all faiths within Pennsylvania's boundaries will be maintained, *except for those few numerically limited groups which still insist on Sabbath rather than Sunday observance*, sixteen hundred years of social and legal pressure to the contrary notwithstanding.[12] But to small religious minorities such as Orthodox Judaism "'. . . befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom." Justice Murphy, dissenting, in *Prince v. Massachusetts*, 321 U. S. 158, 175, 176 (1944).

3. *The Pennsylvania Act of August 10, 1959, because it restricts appellants' religious liberty, may not be enforced against them unless it be established that their Sunday operations constitute a clear and present danger to society. Whether or not the statute be deemed an infringement of religious freedom, it must be judged by a more exacting standard than are other types of legislation.*

a. THE LEGISLATION RESTRICTS A FIRST AMENDMENT FREEDOM AND, THEREFORE, MUST BE JUDGED BY THE "CLEAR AND PRESENT DANGER" STANDARD.

Legislation the economic effect of which will so clearly be an instrument of religious disaffiliation, must be judged

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[12] The first Sunday law was promulgated by Emperor Constantine in 321 A. D. in conjunction with his establishment of Christianity as a means of unifying his complex empire. **Cross, The Oxford Dictionary of the Christian Church**, pp. 334, 335 (Oxford Univ. Pr., 1957); **Encyc. Brit.**, Vol. 21, **Sunday**, p. 565 (1950). See **Johnson** and **Yost, Separation of Church and State in the United States**, pp. 219, 220 (Univ. of Minn. Press, 1948).

by strict constitutional standards, because such statutes "in their operation diminish the effective exercise" of the right of religious freedom. *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940).

The usual presumption of constitutionality must be balanced by "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U. S. 516, 530 (1945); *Marsh v. Alabama*, 326 U. S. 501, 509 (1946); *Prince v. Massachusetts*, 321 U. S. 158, 164 (1944). "Any attempt to restrict these liberties must be justified by clear public interest, threatened, not doubtfully or remotely, but by clear and present danger." *Thomas v. Collins, supra*; See also *Schenck v. United States*, 249 U. S. 47, 52 (1919). Moreover, it must be established with equal clarity that the particular restrictions imposed upon the right guaranteed by the First Amendment is necessary to meet the danger. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins, supra*. "Freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639 (1943).

b. THE STATUTE RESTRICTS THE LIBERTY OF A SMALL RELIGIOUS MINORITY, UNABLE TO PROTECT ITS INTERESTS THROUGH THE NORMAL POLITICAL PROCESSES, AND, THEREFORE, MUST RECEIVE MORE EXACTING JUDICIAL SCRUTINY.

It is important to note the other, independent reason why this particular legislation is not attended by the usual presumption of constitutionality and must be scrutinized with especial care by this Court.

Justice Stone repeatedly stressed the necessity of especially careful judicial scrutiny of legislation passed under

circumstances throwing doubt upon the reliability of normal political processes. In *United States v. Carolene Products Co.*, 304 U. S. 144 (1938), he enunciated the "rational basis" standard of constitutionality and then qualified it (footnote 4, p. 152) by saying:

> "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. * * * *Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U. S. 510 . . ., or national, Meyer v. Nebraska, 262 U. S. 390, . . .; Bartels v. Iowa, 262 U. S. 404 . . .; Farrington v. Tokushige, 273 U. S. 284 . . ., or racial minorities. Nixon v. Herndon, supra; Nixon v. Condon, supra: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428, 4 L. Ed. 579; South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734, decided February 14, 1938, note 2, and cases cited.*" (Emphasis supplied.)

It will be noted that the "more exacting judicial scrutiny" here referred to has no necessary reference to First Amendment freedom cases. Those cases, and the different standard applicable to them, are also discussed by Justice Stone in the same footnote. And see *South Carolina State Highway Dept., et al. v. Barnwell Bros., Inc., et al.*, 303 U. S. 177, 184, footnote 2 (1938).

And in *Minersville School District v. Gobitis*, 310 U. S.

586, 605, 606 (1940) (the first flag-salute case) Justice Stone said in his dissent:

> "... I am not persuaded that we should restrain from passing upon the legislative judgment as long as the remedial channels of the democratic process remain open and unobstructed. This seems to me no more than the surrender of the Constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes. * * * And until now we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities, although no political process was affected * * *. Here we have such a small minority entertaining in good faith the religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern * * *."

The appellants here are members of a class—Orthodox Jewish retailers—which is small in number. If they, together with Christian Sabbatarians, amounted to really substantial numbers,[13] the normal political processes might indeed protect them—their accumulated weight could make itself felt, and such legislation might well not pass. And if a day of rest could not, therefore, be obtained by passage of a Sunday closing law such as this one, and were still thought to be essential, the legislature would find another way of attacking the problems presumably existing by

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[13] There are 305,086 members of the Seventh Day Adventist Church in Continental United States, and 5,975 members of the Seventh Day Baptist Church. **World Almanac of 1960** (N. Y. World-Tel. and The Sun). See also note 11, supra.

selecting a day not prejudicial to *either* Sabbath observers or Sunday observers, or by legislating *both* days as days of rest, or by requiring businesses to close *on one day or the other*. By this last alternative, for example, no one would be prejudiced and everyone would have adequate rest and time to withdraw from the hurly-burly of wordly cares. It is true that, under this alternative, if there were very substantial numbers of Sabbatarians there would still be lacking something which appellees insist is important—the aura of spirituality hovering over an entire community at rest, about which more will be said later. But this is the price we would have to pay for living in a pluralistic society. *There isn't any real question but that if half our citizens were Sabbatarians, the legislature would be prepared to pay that price, and we would have no such closing law before the Court today.*

The difference then, is in numbers—Sabbath observers are few enough to be at the mercy of an overwhelming majority, acting through its legislature. And this is exactly why such legislation must receive the special attention of the courts.

4. *There exists no justification for enforcing the Pennsylvania Amendatory Act against appellants, whose continuing Sunday operations present society with no dangers, immediate or remote.*

Neither Sabbath observance in the traditional way nor Sunday business by these Orthodox Jews confronts society with any dangers, be they immediate and grave, or remote and slight.

a. THE NEED FOR REST.

Society has a legitimate interest in limiting the number of hours employees work, or the number of consecutive

days. There are any number of ways—legitimate ways—of accomplishing such a result, and in the past the legislature of Pennsylvania has done so without finding it necessary to select a specific day of rest.[14] At one time the Pennsylvania Legislature *did* pass a true, general "day of rest" law. In fact, it was a "day and one-half of rest" law. The Act of July 2, 1937, P. L. 2766, 43 Purd. Pa. Stat. Ann. §§921-931, provided, inter alia: ". . . no employer shall employ any person for . . . more than 5½ days in any period of seven consecutive days." While this Act was later pronounced unconstitutional (because a different portion of the Act, specifically declared to be non-severable, was held to be an unlawful delegation of legislative power), it clearly demonstrates that when the Pennsylvania Legislature was truly concerned with seeing that all persons received a weekly respite from work, it knew how to accomplish that result.

Admitting, then, the right of a state legislature to limit the number of consecutive days a man may work,[15] it does not follow that this legislation is valid. "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at *or in their operation diminish* the effective exercise of rights

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[14] See, e. g., Act of July 25, 1913, P. L. 1024, §3, as amended, 43 **Purd. Pa. Stat. Ann.** §103(a) (Women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended, 43 **Purd. Pa. Stat. Ann.** §46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, §1, 43 **Purd. Pa. Stat. Ann.** §361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, §1, 43 **Purd. Pa. Stat. Ann.** §481 (employees of motion picture theatres must be given one day of rest per week). Many states (Arizona, California, Oregon, Wisconsin and Wyoming) have one-day-in-seven rest laws (See **Sunday Laws**, 25 S. Calif. L. Rev. 131, 134).

[15] It should be noted, however, that the Pennsylvania statutes referred to in the text and in the preceding footnote deal with employees only, a class perhaps much more in need of legislative protection than are entrepreneurs.

so necessary to the maintenance of democratic institutions." (Emphasis supplied.) *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940).

b. Ease of enforcement.

It may be said that a uniform day makes enforcement easier. But mere ease of enforcement cannot be the rationale sustaining a law which will result in religious infringement. Judge Alexander, of the Common Pleas Court of Philadelphia, has correctly pointed up the fact that ". . . such (one-day-in-seven) laws generally are enforced, whereas the sporadic or discriminatory enforcement of the Sunday laws is common knowledge . . . Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used, and mere ease of enforcing a more restrictive alternative will not sustain it. See, e. g. *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949)." *Comm. v. Cavelerro*, (published in The Legal Intelligencer, Philadelphia, June 22, 1960).

c. The need for regular periods of community repose.

Another rationale sometimes advanced to sustain Sunday closing laws is that there is a need for regular periods of community repose. The argument is that on one day a week our highly competitive, commercial society should lay down its arms and call a halt to the economic warfare and strains inherent in our way of life.

The question that immediately comes to mind is whether the alleged need for an entire community at rest is so imperative that Sunday operations by a small number of Orthodox Jews and other Sabbatarians presents our society with the kind of "clear and present" danger this Court has required in the past to sustain legislation effecting religious

freedom. The question almost answers itself. Indeed, it is probably because of the commercial inconsequence of such groups, and the desire to deal fairly with *all* citizens, that such a large number of states have Sunday closing laws with exceptions for those who out of religious conviction rest on another day.[16]

An examination of other legislation[17] held to be valid by this Court makes for a striking comparison between those practices which do, and those which do not, present society with "clear and present dangers". For example, to many Mormons, accepted doctrine required male members to practice polygamy. This duty was enjoined by different books which those Mormons believed to be of divine origin, among others, the Holy Bible, and they believed also that polygamy was required by the direct request of Almighty

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[16] **Mich. Stat.**, Vol. 13, §18.855; **Conn. Gen. Stat.**, §8609 (1949); **Ind. Stat. Ann.**, Ch. 43, §10-4301 (Burns, 1933); **Iowa Code Ann.**, Ch. 729, §1; **Ill., Smith-Hurd Ann. Stat.**, Ch. 38, §549; **Ohio Gen. Code Ann.**, §13045 (Page's); **Kentucky Stat.**, 436.160 (1903); **Okla. Stat.**, tit. 21, §909 (1951); **Maine Laws**, Ch. 121, §360; **Va. Code**, §18330 (1950); **W. Va. Code Ann.**, §6073 (1943); **Wis. Stat.**, §351.52.

[17] Blue Law legislation has never come before this Court, for full argument, in any case involving Sabbatarians. A somewhat analogous problem beset James Madison, as President. He said (**Writings of James Madison**, Vol. 3, pp. 274, 275 [J. B. Lippincott & Co., 1865]):

> "There has been another deviation from the strict principle in the Executive proclamations of fasts and festivals, so far, at least, as they have spoken the language of **injunction**, or have lost sight of the equality of **all** religious sects in the eye of the Constitution. Whilst I was honored with the Executive trust, I found it necessary on more than one occasion to follow the example of predecessors. But I was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or, rather, mere **designations** of a day on which all who thought proper might **unite**, in consecrating it to religious purposes, according to their own faith and forms. In this sense, I presume, you reserve to the Government a right to **appoint** particular days for religious worship. I know not what may be the way of thinking on this subject in Louisiana. I should suppose the Catholic portion of the people, at least, as a small and even unpopular sect in the U. States, would rally, as they did in Virginia when religious liberty was a Legislative topic, to its broadest principle."

God, in a revelation to Joseph Smith, their founder and prophet. This Court, not doubting the bona fides of that belief, nevertheless sustained a conviction for bigamy. But the danger in permitting the practice to continue was both clear and present. The Court said, at pp. 165, 166, that:

> ". . . according as monogamous or polygamous marriages are allowed, do we find the principles in which the Government of the People to a greater or less extent rests. * * * (P)olygamy leads to the patriarchal principle, and which, when applied to large communities fetters the people in stationary despotism, while the principle cannot long exist in connection with monogamy."
>
> *Reynolds v. United States*, 98 U. S. 145 (1878).

Indeed, in *Cleveland, et al. v. United States*, 329 U. S. 14 (1946), this Court considered the practice of polygamy to be "a return to barbarism". At 329 U. S. 19, the point was made that:

> "The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community."

In *Davis v. Beason*, 133 U. S. 333 (1890), the fallacy of granting absolute religious freedom to such sects was exposed when the Court said at 133 U. S. 343:

> "There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passion of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kind ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious

> beliefs, their supporters could be protected in their exercise by the Constitution of the United States."

And see *Murphy v. Ramsey*, 114 U. S. 15 (1885).

In *Jacobson v. Commonwealth of Massachusetts*, 197 U. S. 11 (1905), prosecution followed the refusal and neglect to comply with the statutory requirement of vaccination against smallpox. While Jacobson did not raise religious infringement as a defense, he argued that the statute interfered with his liberty. This Court held that it was within the police power of local government to protect its citizens against contagious diseases. The result could hardly have been otherwise even if a religious scruple had been involved. An entire community can be endangered by the refusal of persons to permit immunization against contagious diseases and the case is a perfect example of a danger both clear and present—of a clash between the desperate needs of a community and the convictions of a man.

Other examples quickly come to mind. In the words of this Court (*Reynolds v. United States, supra*, at 98 U. S. 166):

> "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government in which he lived could not interfere to prevent the sacrifice? Or if a wife religiously believed in burning herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"

A closer case is presented in *Prince v. Massachusetts*, 321 U. S. 158 (1944). The religious practice involved was the distribution of Watch Tower magazines on the streets by young children, members of the Jehovah's Witnesses sect, in conformity with the scripture, "A little child

shall lead them." The laws of Massachusetts forbade girls under the age of 18 to sell magazines or periodicals or to engage in any other trade on the street. The importance of laws protecting children from being forced by their custodians to labor cannot be gainsaid and the case presented a difficult question of balancing the rights of the custodian of the child against the interest of society in protecting children. This Court, making it clear that if an adult rather than a child were involved, the result might well be different,[18] held that the statute was constitutional as applied to a child, Justice Murphy dissenting.

But we are not, in the instant case, dealing with "a return to barbarism" which "is a notorious example of promiscuity", as this Court described polygamy. We are not dealing with a refusal to become immunized against a highly contagious disease. We are dealing neither with attempts at human sacrifices nor with the religious compulsions of those women who burn themselves upon the funeral pile of their dead husbands. Nor are we dealing with child labor, out of religious conviction.

We are dealing with an institution—the Sabbath—as ancient as Judaism, and which Orthodox Jews believe to be at the core of their religion which is so much a part of Western civilization. It is an institution out of which grew Sunday observance among Christians as well as the very statute which Pennsylvania enacted in 1959 and which is the subject matter of this suit. We are dealing with the right of five traditional Jews profitably to operate modest and orderly businesses *and* to continue in the faith of their fathers, without having to make a state-imposed choice between the two.

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[18] Justice Rutledge said, at 321 U. S. 170:

"We think that with reference to the public proclaiming of religion, upon the streets and in other similar places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms . . ."

Thus, the "clear and present dangers" which have justified limitations on religious freedom in the past are entirely absent in the circumstances of the case at bar.

Finally, it must be asked whether an entire community at rest is such a socially desirable result that it may constitutionally be achieved at the expense of cultural diversity. Appellants' counsel are not referring to the emerging ways of life of "suburbanites", ways cutting clear across ethnic, religious and class lines; or the undesirability of stopping by legal compulsion such ways of life in the making,[19] of which the habit of "whole family" shopping on Sunday for family purchases at newly built, massive shopping centers and discount houses is but one example. Such considerations are not directly relevant to this particular case, for appellants are not and do not want to be part of that larger struggle. What has caused them and American Orthodox Jews for generations before them, to live a lifetime of "business as usual" Sundays has nothing to do with these new cultural trends of mid-twentieth century. Sunday business is an old business with them, a way of life, a cultural manifestation of their efforts to support their families without sacrificing sacred beliefs. Sunday work in their week-day trade is not their religious duty, but it is a way of life that developed because of their religion. "The essential characteristic of these (First Amendment) liberties is that under their shield, many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and

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[19] To freeze by law a rapidly changing cultural pattern not heading in dangerous directions is unwise if not unconstitutional. The thought was expressed by contemporary philosopher Horace Kallen (**Cultural Pluralism and the American Idea**, University of Pennsylvania Press, 1956), when he said (p. 55):

> "... whatever stays truly always and everywhere the same stays null and dead. What exists and lives, struggles to go on doing so, and its struggle is its change. A living culture is a changing culture ..."

of many creeds." *Cantwell, et al. v. Connecticut*, 310 U. S. 296, 310 (1940). Can the "type of life" thereby developed by Orthodox Jews, harming no one, be outlawed by the Commonwealth of Pennsylvania?

Religious and ethnic differences have become obliterated in this vast land with amazing rapidity (to the great satisfaction of some and the consternation of others) *without* the aid of legal compulsion. The fondest hopes of some historians and philosophers of forty years ago,[20] that the democratic atmosphere on these shores would permit of the fullest flowering of many diverse ethnic cultures, have been shattered[21] with the mobility of our people and fluidity of social change—without the force that is law. For better or for worse, our people, our religions and our cultures are becoming in more and more ways indistinguishable.[22] Those few who wish to retain their distinctive way of life should be permitted to try without legal hindrance, and to try to influence others, including their children and later generations that their ways are best.

There are circumstances when not only religious pluralism, but cultural differences, too, come under the protective wings of the Constitution. No other rationale suggests itself for the unanimous opinions of this Court in *Meyer v. State of Nebraska*, 262 U. S. 390 (1923), in which a statute which prohibited the teaching of a foreign language to students who had not completed eight grades, was declared unconstitutional; and in *Pierce v. Society of Sisters*, 268

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[20] See, for example, **Horace M. Kallen, Culture and Democracy in the United States: Studies in the Group Psychology of the American Peoples** (Boni and Liveright, 1924), particularly pp. 115, 118-121.

[21] Compare the hopes of Kallen, **ibid.**, with the facts actually emerging, as described by historian **Oscar Handlin, The American People in the Twentieth Century**, Ch. VIII, p. 186, et seq. (Harv. Univ. Press, 1954).

[22] For a study of the impact of the majority culture on several small, insular Jewish communities, see **Ben Kaplan, The Eternal Stranger: A Sociological Study of Jewish Life in the Small Community** (1957).

U. S. 510 (1925), in which it was held that a State could not compel all children to go to *public* school. Justice McReynolds said, at 268 U. S. 535, "The fundamental theory of liberty upon which all government in this Union reposes excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." And see *Farrington, et al. v. Tokushige*, 273 U. S. 284 (1927); *Bartels v. State of Iowa*, 262 U. S. 404 (1923). These are some of the cases referred to by Justice Stone when he stated that special scrutiny must be exercised in reviewing statutes directed at particular religious, racial or national minorities, or affecting discrete and insular minorities. They have one common bond—they are attempts at cultural unification. "Fundamentally, it (cultural unification) would require the complete nationalization of education, the abolition of every form of parochial and private school, the abolition of instruction in other tongues than English and the concentration of the teaching of history and literature upon the English tradition. The other institutions of society would require treatment analogous to that administered by Germany to her European acquisitions." KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES, p. 119 (Boni and Liveright, 1924). Most of these have been attempted. Consistently such attempts have been struck down by this Court.

Analogously, in *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U. S. 624 (1943), a rationale for the compulsory flag salute was that it was needed to foster national unity. In an opinion *not* grounded on the principle of religious freedom, Justice Jackson said, at 319 U. S. 640:

> "Lastly, and this is the very heart of the Gobitis opinion, it reasons that 'National unity is the basis of National security', that the authorities have 'the right to select appropriate means for its attainment', and hence reaches the conclusion that such compulsory measures toward 'National unity' are constitutional. * * * *National unity as an end which officials may*

foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." (Emphasis supplied.)

And if statutory compulsion cannot be used to attain unity in the name of national security, it surely cannot be the means of attaining unity for the sake of community repose and spirituality.

Justice Stone, in *Minersville*, *supra*, at 310 U. S. 606, said of the flag-salute problem:

> "With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."

In the same vein, there would be no momentous problem were a legislature to attempt to adjust its "rest" statute so as not to discriminate against some of its citizens. The Pennsylvania legislature did not even try.

B. The Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, violates the proscription against the establishment of religion contained in the First and Fourteenth Amendments to the United States Constitution.

Concerning the Massachusetts blue law statute, also before this Court, Judge Magruder said:

> "What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious ob-

servances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group."

Crown Kosher Super Market of Mass., Inc., et al. v. Gallagher, 176 F. Supp. 466 (D. Mass. 1959). Pennsylvania has done the same thing.

This Court in *Everson v. Board of Education*, 330 U. S. 1, 15-16 (1947), has held that the "establishment of religion" clause of the First Amendment means at least this:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'. *Reynolds v. United States* [98 U. S. 145 (1878)], at 164."

At page 18 of the same decision this Court added that "State power is no more to be used so as to handicap religions than it is to favor them". See also *McCollum v. Board of Education*, 333 U. S. 203, 210-211 (1948).

This Pennsylvania Amendatory Act is intended to and does in fact protect certain Christian sects and prefer them over other faiths and other sects of Christianity. That this

is the character of the law becomes clear when it is seen as one of a whole complex of Sunday laws and viewed in the light of the long history of judicial interpretation of that legislation.

1. *History of Pennsylvania Sunday Blue Laws.*

The statute of August 10, 1959, P. L. 660, which is here in issue, cannot be viewed as an isolated act. It is merely another law in a whole series of Pennsylvania Acts beginning in early colonial days.

The original Pennsylvania blue law of 1682, *Duke of Yorke's Book of Laws*, 1676, 1682, pages 107, 108, provided, inter alia, as follows:

> "WHEREAS, the glory of Almighty God and the good of Mankind, is the reason & end of government, and therefore, government in itself is a venerable Ordinance of God. And forasmuch as it is principally desired and intended by the Proprietary and Governour and the freemen of the Province of Pennsylvania and territories thereunto belonging, to make and establish such Laws as shall best preserve true Christian and Civil Liberty, in opposition to all Unchristian, Licentious and unjust practices, (Whereby God may have his due, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.
>
> "BE IT THEREFORE ENACTED BY WILLIAM PENN, PROPRIETARY AND GOVERNOUR, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid, in Assembly met, and by the Authority of the same, That these following Chapters and Paragraphs shall be the

Laws of Pennsylvania and the territories thereof. Chap. 1. Almighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind. . . .

"BE IT ENACTED BY THE AUTHORITY AFORESAID, That . . . to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That, according to the example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's day, People shall abstain from their usual and common toil and labour, That whether Masters, Parents, Children, or Servants, they may the better dispose of themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best sute their respective persuasions."

The Act of April 22, 1794, section 1, 3 *Smith's Laws*, page 177, provided, inter alia:

"That from and after the first day of August next, if any person shall do or perform any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practice any unlawful game, and be convicted thereof, every such person, so offending shall, for every such offence, forfeit and pay four dollars, to be levied by distress; or in case he or she shall refuse or neglect to pay the said sum, or goods and chattels cannot be found, whereof to levy the same by distress, he or she shall suffer six days imprisonment in the house of correction of the proper county. PROVIDED ALWAYS, That nothing herein contained

shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment, for the use of sojourners, travellers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families, on the Lord's Day, commonly called Sunday, nor to the delivery of milk, or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon, of the same day."

This law survived and became a part of the Criminal Code of 1939 (Act of June 24, 1939, P. L. 872, Sec. 699.4, 18 Purd. Pa. Stat. Ann. §4699.4). It is still, with certain amendments, the law today.

It is interesting to note that the specific exceptions to the foregoing section do not apply between the hours of 9:00 A.M. and 5:00 P.M., obviously for the purpose of influencing church attendance. Furthermore, the following section of the Act of 1794, section 2, made it a criminal act to "profanely curse or swear by the name of God, Christ Jesus or the Holy Ghost". At varying times it became expedient to riddle the basic law with special exceptions, but in each case there was a built-in protective feature for Christianity. Baseball, football, polo and tennis were permitted in localities which voted for them, but not on Sunday *morning*. Act of Apr. 25, 1933, P. L. 74, §2, 4 Purd. Pa. Stat. Ann. §82; Act of June 22, 1935, P. L. 446, §2, 4 Purd. Pa. Stat. Ann. §152. Motion picture exhibitions (Act of July 2, 1935, P. L. 599, §2, 4 Purd. Pa. Stat. Ann. §60) and public concerts (Act of June 2, 1933, P. L. 1423, No. 308, §2, 4 Purd. Pa. Stat. Ann. §122) were permitted by local option statutes too, but with the same protection for church services.

Another enlightening historical note on the Act of 1794 is set forth in *Commonwealth v. Pedano*, 33 D. & C. 551, 553 (Pa. 1938), where it is stated that "The present act (of

1794) was enacted as a direct result of the yellow fever plague of 1793 which ran rampant in Philadelphia. The plague was regarded as 'a scourge upon a wicked people'. The Pennsylvania legislature hastened to legislate away the wickedness of the people by shackling the devil in his most prosperous day." See also *Sparhawk v. Union Passenger Railway Co.*, 54 Pa. 401, 413 (1897).

2. *Judicial Interpretation of Pennsylvania Blue Laws.*

The Supreme Court of Pennsylvania has from 1853 to date, acknowledged—indeed, insisted—that the Sunday blue laws were based upon the fact that Sunday is a day which occupies a special position in the Christian religion. In *Sparhawk v. Union Passenger Railway Co., supra*, the Court said, at 54 Pa. 423:

> "*Rest and quiet, on the Sabbath day, with the right and privilege of public and private worship, undisturbed by any mere wordly employment, are exactly what the statute was passed to protect:* 10 Casey 398." (Emphasis supplied.)

In *Commonwealth v. Nesbit*, 34 Pa. 398 (1859), the Court said:

> "*Let us inquire why people are forbidden to carry on their worldly business on the Sabbath? Our brother Woodward has already shown, that it is in order that people may devote the day to rest, and to the worship of God.* . . .
>
> . . . . . .
>
> "*How, then is it possible for a Christian people to avoid protecting such a day and its institutions?* If

there are men who oppose them as superstitions, let them at least respect them as essential constituents of the people's life, which cannot possibly be laid aside at will. If strangers to our institutions dislike these particular ones, let them accord a reasonable respect to us, and indulgence to our customs, and they will soon be reconciled to both, and find other matters more needing their reforming efforts.

* * * * * * * *

"On the other hand, *a special purpose of the day is, that people may enjoy religious worship and instruction,* and hence, the functions of the preacher, the religious teacher, the sexton, the organist, and the singers, are not forbidden, even though these persons engage in these employments as a means of livelihood. Hence, also, the ordinary means of attending public worship are not forbidden, when used purely for this purpose. In this view of the case, it is the rightness and the exigencies of the purpose that justify the ordinary means of effectuating it. *Conducting and attending religious worship are among the very purposes for which the law protects the day,* and therefore all the means which common usage shows to be reasonably necessary for these purposes, are not forbidden" (pp. 405-408). (Emphasis supplied.)

In *Commonwealth, ex rel. v. American Baseball Club of Philadelphia,* 290 Pa. 136, 143 (1927), the *last* time the Commonwealth's highest court has spoken on the subject, the Act of 1794 was upheld on the ground that *"Christianity is part of the common law of Pennsylvania . . . Sunday is the holy day among Christians."*

There is not one decision of the Pennsylvania Supreme Court in the last century which places the Sunday Laws on any basis other than the support of Christianity by honoring its holy day, the Lord's Day, and encouraging Christian religious worship.

3. *Careful draftsmanship of the Pennsylvania Amendatory Act in question, so as to make it appear as purely civil legislation, does not cure its constitutional infirmities.*

As Justice Frankfurter said in *McCollum v. Board of Education*, 333 U. S. 203, 232 (1948):

> "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion'. * * * If nowhere else, in the relation between Church and State, 'good fences make good neighbors'."

Appellants submit that it would be difficult to conceive of a clearer case of governmental protection and preference of a particular religious faith than is exemplified by the entire complex of blue law legislation in Pennsylvania. Indeed, Judge Hastie stated in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944, 951 (E. D. Pa. 1959), that "[t]he historical religious connection is so clear in both state statutes [New York's and Pennsylvania's] as to be obvious and indisputable."

We have reached the point in our constitutional development where legislators know they cannot enact legislation which on its face protects one religion. This Court by its opinions in the field of religious freedom, and in its emphasis on the principle of separation of church and state, has outmoded assertions that Christianity is part of the

common law of any state.[23] Thus, the Pennsylvania blue law statutes of the past several years are phrased in purely civil terms and make no reference to a deity or to Christianity.[24] But basic constitutional principles cannot be evaded merely by a change in draftsmanship. Careful phraseology does not camouflage the fact that all the latter day rationalizations for blue law legislation—the need for rest, for uniformity of enforcement, for community repose—have been conceived to save legislation, the real and obvious and heretofore admitted purpose for which is the protection and preference of Christianity.

Almost seventeen hundred years ago Emperor Constantine promulgated the first Sunday blue law as part of his program of empire unification by means of the establishment of Christianity.[25] From that day until this, blue law legislation has been religious in origin and purpose. The underlying statute in Pennsylvania today prohibits worldly employment on the "Lord's day", and Pennsylvania Courts have consistently justified the statute on the grounds that it protects Christianity. Thus, blue law legislation in 321 A. D. was among the first progeny of the marriage of Church and State and was viewed in the same light during the entire ensuing sixteen centuries until today. Such legislation does not comport with the ideals of a people who have "staked the very existence" of their country on "the faith that complete separation between the state and religion is best for the state and best for religion". *McCollum v. Board of Education, supra*, at p. 232.

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[23] Thomas Jefferson explored the origin of the assertion that Christianity is part of the Common Law of England. In one of his many fascinating letters to John Adams he concluded that the assertion had no basis. **Cappon, The Adams-Jefferson Letters**, Vol. II, pp. 422, 423 (Chapel Hill, 1959).

[24] In addition to statute under consideration, see, for example, Amendatory Act of July 8, 1957, P. L. 565, §1, 18 **Purd. Pa. Stat. Ann.** §4699.9 (supp.).

[25] See note 12, **supra.**

C. The Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, is arbitrarily selective in the commodities and businesses affected, in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

This case has been placed on the summary calendar for oral argument together with three other cases, one of which involves the identical Pennsylvania Act (*Two Guys From Harrison-Allentown, Inc. v. McGinley*, October Term, 1960, No. 36). Appellants' counsel have stressed in this brief the effect of the Act on these Orthodox Jews and similarly situated Sabbatarians. The arbitrary selectivity of the Act is a point which will be covered in full in the *Two Guys* brief, and, therefore, counsel for appellants will not burden the Court with further argument which can add little to the arguments set forth therein.

VIII.

CONCLUSION.

For all of the foregoing reasons, enforcement of the legislation before this Court will violate the First and Fourteenth Amendments to the United States Constitution. Appellants pray this Court to reverse the Final Order of the Court below (R. 18, 19) dismissing their Amended Complaint and to remand the case for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 67

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

v.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

BRIEF OF AMICUS CURIAE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

I. INTEREST OF THE AMICUS CURIAE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

This amicus curiae brief is submitted by the Retail Clerks International Association, AFL-CIO, with the written consent of all parties.

The Retail Clerks International Association (hereafter referred to as the Association) is a labor organization whose 350,000 members are employed in retail

stores throughout the United States. Many thousands of its members are employed by retail establishments in the Commonwealth of Pennsylvania and are affected immediately by the statutes under consideration. The Association represents its members in collective bargaining relations with retail employers.

Founded in 1888, one of the major purposes of the Association has been to secure relief from the oppression of the seven day work week in the retail industry. This purpose has continued over the years and remains an important purpose of the Association. Section 3(H) of the Association's Constitution of 1959 declares this principle in these terms:

> "We proclaim that Sunday should be a day of rest. Accordingly, we shall undertake to educate our members, employers, and the consuming public to recognize and accept the fact that store operations on Sunday are not necessary. Where laws exist prohibiting Sunday work, they should be rigidly enforced."

The members of the Association are adherents of all major religious faiths. From its origin in the 1880's, the Association has viewed Sunday store closing as a desirable social policy, regardless of any religious significance which this day may have for adherents of certain religious faiths. The Association cherishes our constitutional protections of religious freedom and of minority rights.

Finally, the Association wishes to make clear that it has intervened in this case—rather than in any of the companion cases—because intervention in this case was readily consented to by the parties. It is believed, however, that the views expressed herein are generally

applicable to all four of the "Sunday closing" law cases before the Court.

II. SUMMARY OF THE ARGUMENT

Day of rest laws are an important part of any scheme of legislation designed to protect the health and morals of American working men and women. The social desideratum of creating one uniform day of rest for all workers in a community has been recognized not only by most states of the United States but also by most of the democratic nations of the world. This desideratum has been adopted by a convention of the International Labor Organization (ILO).

State legislation granting such protection to retail employees is of particular importance, because the federal Fair Labor Standards Act exempts retail industry employees from its coverage. Thus, in the absence of federal protection, retail workers—many of whom do not yet enjoy the benefits of collective bargaining—stand in critical need of the minimum protection of state, Sunday closing legislation.

Social scientists and students of community problems regard a uniform, community-wide day of rest as an important social cohesion which strengthens both family and community ties. Where working schedules are such that the worker is deprived of the opportunity to share leisure time in common with his family and with his community, the social consequences are patently harmful. Irregular working hours are related to social problems of various types, including the high divorce rate, juvenile delinquency, and lack of participation in community affairs.

A most severe challenge to the desideratum of a uniform, community day of rest lies in the expanding

retail industry. Because federal legislation and collective bargaining contracts have created whole weekends of leisure for most American workers, weekends have become particularly important shopping days. In the fiercely competitive retail industry, the inevitable economic consequence has been that many giant retail enterprises seek to operate seven days a week. This challenge has been intensified in recent years with the exodus of the population to the suburbs and the growth of suburban shopping centers.

These social problems are the legitimate concern of state legislatures. By enacting "Sunday closing" laws, state legislatures have made a valuable contribution to the psychological and physical welfare of their citizens and to the strength of the family and the community.[1]

III. THE ARGUMENT

A. A Community Day of Rest Has Long Been Recognized as an Invaluable Social Objective by American Workers, Regardless of Religious Considerations. In American Society, Sunday is a Unique and Exemplary Day

Seventy-five years ago, this Court observed that "Sunday closing" laws are "beneficient and merciful" because they "protect all persons from the physical and moral debasement which comes from uninterrupted labor." *Soon Hing* v. *Crowley*, 113 U.S. 703, 710 (1885). At approximately the same time, *amicus curiae* Retail Clerks International Association, AFL-CIO, was founded by retail store clerks who engaged in concerted action to end the seven day work week

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[1] Counsel for *amicus curiae* wish to acknowledge the assistance of Dr. Lewis A. Coser, Professor of Sociology at Brandeis University, in the preparation of this brief, particularly in connection with the sociological problems discussed herein.

in retailing. (See Kirstein, *Stores and Unions*, Fairchild Pub., Inc., N.Y. 1950, pp. 15-24). In the 1890's local unions chartered by the Retail Clerks International Association sponsored "Sunday closing" laws in many communities. *Ibid*, pp. 20-21. Notwithstanding the fact that certain religious groups also favored these laws for reasons of their own, the Association's only interest has been social and economic.

While the forty hour week has become fairly common in the unionized sector of the retail industry, many millions of retail workers—mostly women—do not yet enjoy the benefits of collective bargaining. These employees, protected neither by the federal Fair Labor Standards Act[2] nor union contracts, are still subject to long hours of toil for notoriously low wages.

Other retail employees, who enjoy a forty hour week and collectively bargained working conditions, are deprived of priceless opportunities to participate in family and community activities when they are required to work on Sunday, because this is the single day of the week when members of the family and the community share leisure time.

In American society, Sunday is not just another day. Whatever the reasons historically and culturally, Sunday is a special day in the life of almost every American—regardless of his religion. Its unique importance has been memoralized in drama, novels and poetry. Sunday is the one day of the week when television programs of a superior quality are available in such areas as public affairs, music and literature. Sunday is also the day when that popular phenomenon,

[2] Retail employees are exempted from the protective coverage of the Fair Labor Standards Act. 29 USC Sec. 213.

the "Sunday driver," roams the highways with his family. Schools, courts, post offices, and most other public offices are closed. Sunday is also a special day for parades, picnics, political meetings, double-header baseball games, concerts, family reunions, gigantic newspapers and many other familiar—invaluable—institutions.

Therefore, the Association respectfully submits that state "Sunday closing" statutes have properly taken cognizance of the social importance of this unique day in American society and have made invaluable opportunities available to America's millions of retail employees. These laws help to strengthen—not weaken—social democracy in America.

B. Throughout the World, Democratic Nations Have Guaranteed Workers a Day of Rest as a Feature of Social Welfare Legislation

Day of rest statutes are to be found in the protective legislation of most of the world's democratic nations. An official publication of the International Labor Organization (ILO) sketches the background of day of rest legislation: (*Weekly Rest in Commerce and Offices*, International Labor Conference, 39th Session, 1956, Report VII (1) Geneva, 1955, p. 3.)

> "It is a practice which is deeply rooted in the customs of all peoples independently of their degree of economic and social development. *Quite often the practice originated as a religious observance and developed into a tradition which has persisted despite the disappearance of the original reasons or the decline in the part played by religious institutions in the social structure.* Labor legislation has endeavored to maintain and extend this practice in the light of the economic needs of modern society. . . ." (Emphasis added.)

Almost all nations have some kind of legislation guaranteeing the worker's right to a day of rest. A number of national constitutions specifically mention this basic "right" of workers. In many other countries, regulations dealing with weekly rest are incorporated into general social legislation.

The I.L.O. report on *Weekly Rest in Commerce and Offices* also sets forth the important policy considerations underlying day of rest laws: (*Ibid*, pp. 3-6)

> "A number of countries have . . . legislative provisions which relate exclusively to the workers' weekly rest. In some countries legislation deals particularly with the weekly rest in commerce and offices or in certain classes of establishments. These provisions are based upon recognition of the fact that a weekly rest for the worker, like any other form of rest, meets physiological, psychological, social and economic needs, which become greater with the development of production in its modern forms. Physiologically and psychologically, rest is necessary to renew and restore worker's physical strength and also his mental functions, and to make for the greater safety both of the workers in and of the persons served by certain types of establishments. Socially it gives him more time for family and community life. From the economic point of view, it is necessary if he is to maintain his individual output, which is an essential element in production. Legislation based on these considerations was first introduced at the beginning of the century in Belgium, France and Spain. Other countries which later adopted such legislation included Argentina, Australia, Bolivia, Canada, Colombia, Czechoslovakia, Greece, India, Italy, New Zealand, Poland, the Saar, El Salvador, Switzerland, Tunisia, Turkey, the United States and Uruguay."

This, legislation designed to insure that workers may enjoy one day of rest each week is by no means limited to the United States.

The International Labor Organization, meeting in Geneva in 1957, unanimously adopted a "Weekly Rest Convention" with the concurrence of American representatives of labor, employer and government organizations. Article 6 of this convention reads as follows: (Record of Proceedings, International Labor Conference, 1957, Geneva, 1958 pp 794-801.)

> "1. All persons to whom this convention applies shall, except as otherwise provided, be entitled to an uninterrupted weekly rest period comprising no less than 24 hours in the course of each period of 7 days.
>
> "2. The weekly rest period shall, whenever possible, be granted simultaneously to all persons concerned in each establishment.
>
> "3. *The weekly rest period shall, whenever possible, coincide with the day of the week established as a day of rest by the traditions or customs of the community or district.* (Emphasis added.)
>
> "4. The traditions and customs of religious minorities shall, as far as possible, be respected."

Civilized nations throughout the world, therefore, have recognized not only the importance of a day of rest for workers but they have also recognized that the day of rest should be the day "established as a day of rest by the traditions or customs of the community." In America, custom and tradition have undeniably established Sunday as the uniform day of rest. In view of this nearly unanimous agreement of the nations of the world that such laws make an important contribution

to the welfare of their citizens, it is respectfully submitted that state legislatures which enact day of rest statutes act in the public interest and for the welfare of all.

C. A Community Day of Rest is an Incomparable Social Cohesion. It Makes a Positive Contribution to the Health of the Worker, the Family and the Community. It Helps to Minimize Such Social Evils as High Divorce Rates and Juvenile Delinquency

1. The Exodus to the Suburbs and Other Pressures of Modern Society Have Intensified a Need for a Community Day of Rest.

It is axiomatic that, to create a socially healthy community, its citizens must enjoy a stable family life and the time and opportunity to participate in the web of associations which draws the community together. Because modern industrial society pulls its citizens apart during their working hours, it is essential that there be common, non-work periods when citizens can jointly pursue social, political, cultural, recreational and educational interests.

A democratic community must depend on the active participation of citizens in community affairs. The community, through government, however, has a moral duty to maximize the opportunities for such participation. On work days, the very nature of the work process usually makes it impossible for the worker to concern himself with community affairs.

The rush toward the suburbs has been one of the most significant social developments of the last twenty years. This trend has had social consequences of great magnitude, some of which are directly related to the case at bar. As the distance between dwelling place and working place increases, the allegiance of the typical com-

muter has become divided between these two distinct communities. The individual's relationship to each of these communities may be fragmentary, because each community has meaning for only one side of his life.

From the point of view of the individual, where and how can he be an effective citizen in these circumstances? The community where he works is of very limited importance to the worker who lives in the suburbs, because he does not look to his working community to satisfy the educational, police and other civic needs of his family. On the other hand, if the suburban home community is merely a "dormitory community," its inhabitants will be forced into a pattern of fragmentary citizenship. The suburbanite may have two communities but be a meaningful citizen of neither.

Under these circumstances of urban-industrial life, can it be said that a state legislature has exceeded the limits of the federal constitution by assuring, legislatively, that Sunday work schedules do not deprive inhabitants of the suburbs of the opportunity to identify themselves with local community life? Is it not in the public interest that legislatures have set aside one day during which citizens are freed from commitments to their working place and can devote themselves to the affairs of their family and their home community?

Sociologists are in broad agreement that so-called primary groups (i.e., groups involving intimate face-to-face contact, in particular the family and the neighborhood group) are fundamental in forming the social personality and ideals of the individual. In such groups there is a mutual identification and a "we" feeling not to be found in other relationships. (See Cooley, *Social Organization*, Chas. Scribner & Sons,

1909). Primary ideals of life, such as love, justice, fair play and good will, do not come to most citizens from abstract philosophy or from solitary living: they come basically from family and local community life, and they are reinforced daily in primary group experience. If the strength of primary groups is eroded by the pressures of mass society, the potential consequences could be anti-social. To the extent that Sunday work disrupts family, community and primary group experiences, it contributes to the weakening of the social values of our society.

2. Sociological Studies Show That Irregular Work Schedules Undermine the Worker, His Family and His Community. The Problems of Irregular Work Schedules Are Intensified Because of the Increase of Women in the Labor Force.

Several sociological studies have illustrated in recent years the detrimental effects of irregular work schedules, such as rotating shifts or night shifts, on the life of industrial workers. In an article entitled "A New Look at the New Leisure," Edwin Blakeloe makes this observtaion: (Administrative Science Quarterly, March 1960 IV, 4.)

> ". . . consider a worker on shifts that are changed approximately once a week (a typical schedule of rotation). Thinking of a pattern of his life over a period of several months, one sees his 'week-end' move slowly through the week, while his work 'day' changes from morning to afternoon to night."

A comparison by Blakeloe, *Ibid*, of 134 shift and 160 non-shift workers in an oil refinery showed the former to have a distinctly reduced range of organizational membership. They had less chance to achieve leadership positions; they held office less often; they attended

meetings less frequently; they belonged to fewer organizations and clubs. They visited less frequently with friends and fellow workers.

Professor Daniel Bell, in *Work and Its Discontents* (Boston, Beacon Press, 1956, p. 52), says:

> "... more and more workers may find themselves working 'out of hours.' In such work communities, the rhythms of sleeping, eating, social and *sexual* life become skewed. A man on the regular eight-to-four shift follows a cycle of *work*, *recreation* and *sleep*, while during the same day the fellow on the four-to-twelve shift is on a cycle of *recreation*, *work* and *sleep*, while the night man goes through his twenty-four hours in *sleep*, *recreation*, and *work*. Where this occurs, friendship-patterns may change abruptly."

Paul and Faith Pigors, in their study *Human Aspects of Multiple Shift Operation* (Massachusetts Institute of Technology, Cambridge, Mass., 1944, pp. 26-27), make these observations on the effects of "afternoon shifts":

> "Most employees on second shift schedules acknowledge that recreation is 'out' and it is for this reason that the second shift is so objectionable. The degree of dislike occasioned by the necessary realignment depends on particular needs for synchronizing one's activities with the normal daily rhythm of other people's lives ... They now have to live on a schedule difficult for any individual to adjust to and practically impossible to synchronize with the rhythm of normal family life ... This topsy-turvy existence is hard on all but the most solitary and independent persons, since the day begins with leisure and ends with work."

Professor William Cottrell in his study of *The Railroader* (Stanford University Press, 1940) shows how the life and personality of the operating railroad worker is drastically influenced by the special work schedule he must observe. Says Cottrell: (*Ibid*, pp. 73-74, and 77.)

> "Membership in any organization with regular meetings is difficult to maintain and the socializing effect of such contacts is lost . . . Civic participation is rendered difficult. No membership on governing boards is feasible, and promised aid in community service may be impossible to render . . . Family life is greatly affected. If the wife and mother attempts to make her family an integrated part of the community, she must conform to its timing . . ."

It is unrealistic to think of leisure merely in quantitative terms. It is, of course, true that a worker on a rotating shift or night shift or a worker working on Sunday may have quantitatively as much leisure as his fellow worker on a regular schedule, but the *quality* of his leisure will be quite different. Most people simply need leisure when others have it, if social life is not to be impoverished.

What has been said about the effects of irregular work schedules, including Sunday work, applies even more strongly to family life than it does to the life of the general community. If the members of the family are not united by common leisure, family stability is endangered.

Among the important changes in the composition of the labor force in recent years has been the significant increase of the number of employed women. For every one hundred men in the labor force there were twenty

working women in 1890; by 1955 the number of working women per hundred men rose to forty-one. An even more significant development has been the increase in the labor force of married women. Married women coinstituted 52.2 percent of the 1950 female labor force, as compared with 13.5 percent in 1890. Bancroft, *The American Labor Force* (New York 1958, pp. 32-33).

Given the fact that a very high proportion of married women are now employed and are absent from their homes during a substantial part of every week, it has become especially important that there be at least one day during the week which all members of the family can share. In the retail industry, where millions of women are employed, this problem is of prime importance.

3. Juvenile Delinquency, the High Divorce Rate and Other Social Evils Flow From Weak Family Relations. Common, Shared Leisure Time on Sunday Helps to Strengthen the Family as an Institution.

Weakening of family ties is a common source of the problems of juvenile delinquency. For example, in a special study of 966 cases of young delinquents in Boston, Harvard Law School professors Sheldon and Eleanor Glueck found that 48 percent came from broken homes. *One Thousand Juvenile Delinquents*, Cambridge, Mass., Harvard University Press, 1934, pp. 75-77.

The same authors in another study of the family background of 5,000 young offenders, committed to the Massachusetts Reformatory for serious offenses, reported that 60 percent came from broken families. Sheldon and Eleanor Glueck, *Five Hundred Criminal Careers*, Knopf, 1930, pp. 116-18.

The Glueeks' pioneering study of juvenile delinquent shows that a high percentage of delinquent boys came from families which did not share their leisure time: (*Unravelling Juvenile Delinquency,* Harvard University Press, 1950, p. 113.)

> "Not only was there less supervision of the children in the families of the delinquent boys, but there was also *less provision for recreational activities for the family as a group, such as picnicking or going to the beach together, riding in the country, visiting relatives or attending the movies.* Among two-thirds of the families of the delinquents, no group recreation was undertaken by the family as a unit, compared with a third of those of the non-delinquents." (Emphasis added.)

In other words, one of the factors which clearly distinguished the family background of delinquent and non-delinquent boys was the presence or absence of family recreational activities. Sunday is quite naturally the day when the family can share leisure time and enjoy common recreational experiences.

The very high incidence of divorce in the United States in recent years is another well known social problem. The number of divorced persons per 100 married was 0.54 in 1890; by 1949 it had risen to 2.83, representing an increase of 521 percent. The average number of divorces per 100 marriages was 5.56 during the 1881-90 decade, but it rose to 25.89 percent in the 1940-49 decade, an increase of 466 percent. "Statistical Perspectives on Marriage and Divorce," The Annals, November, 1950 vol. 272, pp. 9-21. Today, roughly one marriage in four ends in divorce.

Although no single cause can be singled out to explain these shocking statistics, the irregularity of work-

ing schedules and the denial of opportunities to share leisure time experiences appear to be contributing causes. While "togetherness" has become a fun-poking phrase, the absence of family "togetherness" is universally regarded to be a factor contributing to the disintegration of the American family.

We shall not set forth here the multitude of other social problems which can be traced directly to the loosening of family discipline and family bonds, because the importance of family stability to the mental health of the individual and to the moral health of the community is everywhere agreed upon.

It is respectfully submitted that the findings of social scientists and community relations observers have demonstrated the significant social value of a uniform, community day of rest for American workers and all citizens. By enacting "Sunday closing" laws, state legislatures have exercised their police powers for a legitimate social object and in a manner reasonably calculated to benefit the individual and the community.

IV. CONCLUSION

The Court should affirm the judgment of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 No. 67

Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman,
Appellants,

v.

Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, and Victor H. Blanc, District Attorney of the City of Philadelphia,

and

Pennsylvania Retailers' Association, Intervening Defendant,
Appellees.

On Appeal from the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 *et seq.*

BRIEF FOR PENNSYLVANIA RETAILERS' ASSOCIATION, INTERVENING DEFENDANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960. No. 67.

Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman,
Appellants,

v.

Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, and Victor H. Blanc, District Attorney of the City of Philadelphia,

and

Pennsylvania Retailers' Association, Intervening Defendant,
Appellees.

BRIEF FOR PENNSYLVANIA RETAILERS' ASSOCIATION, INTERVENING DEFENDANT

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Whether the Pennsylvania Sunday retail closing law of 1959 and the enforcement thereof constitute an establishment of religion in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the application of a Sunday closing law to business establishments of individuals whose religion requires them to refrain from labor at other times during the customary business week, interferes with the free exercise of religion by those individuals and hinders their faith in its ability to compete with other sects for adherents in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the Pennsylvania Sunday retail closing law of 1959 violates the equal protection or due process clause of the Fourteenth Amendment to the United States Constitution by applying only to the sale at retail of certain specified commodities.

COUNTER-STATEMENT OF THE CASE.

Appellants, plaintiffs below, seek a permanent injunction restraining enforcement of Pennsylvania Act No. 212 of August 10, 1959, P. L. 660, 18 Purdon's Pa. Stats. Ann. § 4699.10. That Act, which was passed after public hearing and legislative debate, makes it unlawful to sell, or to offer to sell, at retail on Sundays enumerated types of goods and provides penalties for violation thereof. The sale of the subject commodities previously came within the ambit of the general Pennsylvania Sunday closing law, Section 699.4 of the Penal Code of June 24, 1939, P. L. 872, 18 Purdon's Pa. Stats. Ann. § 4699.4. The penalty for violation of the 1939 statute is a nominal fine, whereas the 1959 Act provides for substantial fines and possible jail sentence. Both statutes are found in the Penal Code in Article VI, entitled "Offenses Against Public Policy, Economy and Health."

Plaintiffs allege in their Amended Complaint that each is a retail seller of merchandise subject to the 1959 Act and an observant and orthodox member and adherent of the Jewish religion. They allege that, pursuant to that

faith, each plaintiff closes his place of business from nightfall Friday until nightfall Saturday. Plaintiffs further allege that Friday night and Saturday are the night and day of the week when their competitors do their greatest volume of business.

Plaintiffs have previously kept open their places of business on Sundays in violation of the general Pennsylvania Sunday law cited above. They allege that, if they continue to do so, they will subject themselves to prosecution under the 1959 Act with its higher penalties. Plaintiffs transact considerable business on Sundays. The loss of that business would substantially reduce their incomes and, in one instance, would allegedly cause the enterprise to fail.

Appellees Gibbons and Blanc, defendants below, moved to dismiss the Amended Complaint.[1] The three-judge statutory court granted that motion, relying upon the opinion of another statutory court of the same district in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), *probable jurisdiction noted*, 362 U. S. 960 (1960). That case, two other appeals involving Sunday laws,[2] and the present appeal have been set down for argument together. 28 U. S. Law Week 3317, 3346 (1960).

SUMMARY OF ARGUMENT.

I.

In our 20th century American society, Sunday is a day of rest, relaxation and recreation, in addition to

[1] Pennsylvania Retailers' Association was granted leave to intervene as a party defendant, the court finding that the "Association has an interest in the above-entitled action sufficient to warrant it to become a party to the action" (R. 9).

[2] *McGowan* v. *Maryland*, October Term, 1960, No. 8; *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, October Term, 1960, No. 11.

being the day on which many Christian sects worship. This modern enjoyment of Sunday is now well-established custom and is the result of a trend toward secularization and of improved working conditions.

The decisions of this Court and of our highest State courts have consistently upheld Sunday closing laws on the ground that they represent proper health and welfare statutes, and that such laws are not, in purpose or effect, statutory attempts to further the religious interests of Christian sects which worship on Sunday. *Hennington* v. *Georgia*, 163 U. S. 299 (1896); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960).

II.

The recent decisions of this Court which have considered the establishment of religion clause of the Federal Constitution hold that, where there is a legitimate secular objective, a statute is valid even though there may be some incidental sectarian benefit. *Everson* v. *Board of Education*, 330 U. S. 1 (1947). The most that can fairly be said against Sunday closing laws is that the uniform day of rest coincides with the Christian day of worship and that in a remote way they make it easier for Sunday worshippers to attend church on that day. That Sunday closing laws may originally have been religiously inspired and today may be supported by some for religious reasons, does not invalidate the legitimate secular purpose which those statutes are designed to accomplish.

III.

The facts of this case do not fall within the familiar litigated restraints upon religion, if they constitute a restraint at all. Appellants contend that, because they have voluntarily sacrificed the business opportunities of Friday night and Saturday for religious reasons, they should be afforded an opportunity on Sunday to recoup a portion of their losses. The loss of the economic oppor-

tunity to sell on Sunday does not raise an issue of religious freedom under any of the decisions of this Court.

Sunday retail selling is not a religious right but only a custom which appellants have adopted. No decision of this Court has ever suggested that, when individuals make economic sacrifices for religious reasons, the Federal Constitution requires a State in general legislation to provide an exemption for such persons. Pennsylvania having determined that Sunday shall be the uniform day of rest and recreation, appellants have no constitutionally guaranteed right to keep their stores open on that day merely because they have closed on Friday night and Saturday in recognition of their religious obligations.

None of the decisions of this Court require the application of the "clear and present danger" test, except where there is direct statutory interference with religious beliefs and the expression thereof. Such interference is not presented by the 1959 Pennsylvania statute, which simply prohibits Sunday retail selling. Similarly, the 1959 Pennsylvania law is a statute of general application to all Pennsylvania retailers selling the described commodities and is not "directed at particular religious, * * * or national, * * * or racial minorities." The *Carolene Products* footnote 4 therefore has no application.

IV.

The 1959 Pennsylvania statute is not unreasonably discriminatory by reason of its increased penalties imposed upon the described commodities. Moreover, the enumeration of alleged inconsistencies in classification does not carry the burden of proof necessary to establish arbitrary classification. The decisions of this Court do not require "mathematical nicety," but prohibit only "invidious discrimination," in classification. *Morey* v. *Doud*, 354 U. S. 457 (1957).

The overwhelming number of State courts have sustained Sunday closing statutes, such as the 1959 Pennsyl-

vania statute, which have been based upon commodity classification and which treat equally all who sell the same commodity at the same level of distribution. This Court has dismissed, for want of a substantial federal question, every appeal which has challenged Sunday closing laws on a classification basis.

There are rational bases for the 1959 Pennsylvania Sunday retail closing law in that, as found by the Court in the companion case, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), that statute imposed the heavier penalties because the problem of Sunday retail selling had become "newly acute" and the described commodities were the principal categories of merchandise sold. Furthermore, this statute is in aid of the modern enjoyment of Sunday as a day of rest, relaxation and recreation. *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960).

ARGUMENT.

I. Sunday Closing Laws Have Long Been Recognized as a Legitimate Exercise of the Police Power To Establish a Common Day of Rest and Relaxation for the Benefit of the General Public.

A. Courts Recognize the Welfare Objective of Sunday Closing Laws.

This Court considered challenges to Sunday laws in three decisions at about the turn of the century. Those cases all involved state statutes before this Court had held that the due process clause of the Fourteenth Amendment incorporated the religious freedom guarantees of the First Amendment. Those decisions nonetheless establish that this Court has regarded Sunday laws as "day of rest" statutes and as legitimate exercises of the police power.

In *Soon Hing* v. *Crowley*, 113 U. S. 703, 710 (1885), this Court said:

"* * * Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

In *Hennington* v. *Georgia*, 163 U. S. 299, 304 (1896), this Court stated:

"In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the State committed these matters to

> the determination of the legislature. If the law making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature. The legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was 'of admirable service to a State considered merely as a civil institution.' "

See also *Petit* v. *Minnesota*, 177 U. S. 164, 165 (1900). The Pennsylvania Supreme Court had already reached the same conclusions with regard to that State's general Sunday law in *Specht* v. *Commonwealth*, 8 Pa. 312, 323 (1848).

Similar statements are also to be found in the decisions of the highest courts of almost every state in the union. *E.g.*, *Lane v. McFadyen*, 259 Ala. 205, 208, 66 So. 2d 83, 85 (1953); *Humphrey Chevrolet* v. *City of Evanston*, 7 Ill. 2d 402, 405, 131 N.E. 2d 70, 72 (1956); *Tinder v. Clarke Auto Co.*, 238 Ind. 302, 312-316, 149 N. E. 2d 808, 813-815 (1958); *Two Guys from Harrison, Inc. v. Furman*, 32 N. J. 199, 216, 160 A. 2d 265, 274 (1960); *People v. Friedman*, 302 N. Y. 75, 79-80, 96 N. E. 2d 184, 186 (1950), *appeal dismissed*, 341 U. S. 907 (1951).

B. "Latter Day Rationalizations" for Sunday Closing Laws: The Increasing Secularization of American Society and the Improvement of Working Conditions.

Appellants in the present action, in common with others who oppose Sunday laws on religious grounds, devote considerable space in their brief to matters historical, with particular reference to the Roman Emperor Constantine and to the legislative activities of the American

colonies. While such archaeology is no doubt interesting, it appears to have little to do with present-day realities.

Of much greater significance are two more recent trends: the increasing secularization of American society, and improvement of working conditions as a result of the rise of American labor and enlightened management. It seems fair to suggest that with increasing secularization, Sunday closing might well have disappeared from the American scene, absent the movement to improve working conditions.

Without taking cognizance of those developments of the last hundred years, the *amicus* brief of the Synagogue Council of America and the National Community Relations Advisory Council sees fit to describe judicial pronouncements upholding Sunday closing laws as day of rest statutes as "latter day rationalizations." (*Amicus* brief, pp. 16-23.) *Amici* suggest:

> "Only in recent years, particularly after it was recognized that the First Amendment's ban on laws respecting an establishment of religion or prohibiting its free exercise is applicable to the states, has there been an effort to justify the compulsory Sunday laws as welfare rather than religious statutes." (*Amicus* brief, p. 17.)

Wholly apart from the increasing secularization of American society and the improvement of working conditions, *amici* overlook the fact that the Pennsylvania Supreme Court's decision in the *Specht* case, *supra*, to which *amici* refer (*amicus* brief, p. 19), came before the Fourteenth Amendment had even been suggested. Moreover, this Court's decisions quoted above, to which both *amici* and appellants omit any reference, preceded any decision holding that the Fourteenth Amendment made any portion of the First Amendment applicable to the states. Thus, for two reasons, there is no foundation for the charge of bad faith which *amici* level at our courts, both state and federal, in upholding Sunday closing laws.

Appellants similarly charge "[c]areful draftsmanship of the Pennsylvania Amendatory Act in question so as to make it appear as purely civil legislation. * * *" (Appellants' brief, p. 39) They label as "camouflage", and complain of, the omission from "Pennsylvania blue law statutes of the past several years * * * [of any] reference to a deity or to Christianity." (Appellants' brief, p. 40.)[3]

In their attempt to brand the 1959 Pennsylvania Sunday retail closing law as a religious statute, appellants and *amici* have completely ignored the trend toward secularization which has occurred in American society. With the increasing industrial and economic growth of our country in the second half of the 19th century, the American worker was soon burdened with longer hours of work per day, and in many businesses the seven-day work week became commonplace.[4] In this context labor unions were

[3] The omissions about which appellants are concerned are apparently of the phrases "worldly employment" and "Lord's day", both found in the general Pennsylvania Sunday closing law as incorporated into the Penal Code of 1939. In light of the inclusion in that section of other quaint language such as "the dressing of victuals", "bake-houses", "sojourners", "watermen", and "persons removing with their families", the retention of the allegedly offensive phrases can be viewed only as a casual retention of former language which occurs so frequently in codifications. Moreover, as to the use of the modifier "worldly" before "employment", its omission "would have limited people in their *religious* exercises as well and a better argument could have been made for its unconstitutionality in that case." *Commonwealth* v. *Bauder*, 14 Pa. D. & C. 2d 571, 580, *aff'd p.c.*, 188 Pa. Super. 424, 145 A.2d 915, *allocatur refused*, 188 Pa. Super. xxviii (1958).

[4] See, generally, COMMONS, HISTORY OF LABOUR IN THE UNITED STATES, Vols. I & II (1958); LESCOHIER & BRANDEIS, HISTORY OF LABOR IN THE UNITED STATES, Vol. III (1958); MILLIS & MONTGOMERY, THE ECONOMICS OF LABOR, Vols. I-III (1945). With regard to retailing, KIRSTEIN, STORES AND UNIONS 6 (1950), states:

"[A] 112-hour work week was common, and in addition to that awesome schedule, it was not unusual for an unmarried clerk to sleep on the counter at the store in order to wait on whatever trade might chance to come by night. Stores in many communities were open at least part of the day on Sundays and on holidays as well."

born, and the struggle for improved working conditions and shorter hours began.[5] The success of labor unions in this field is a well-known chapter in American history which requires no discussion here.

Because the 1959 Pennsylvania statute relates to retail selling, the struggle to improve working conditions in that business is of particular interest. Labor there sought to obtain early closings on weekdays, Sunday and holiday closings, and establishment of maximum hours per week.[6] As part of that campaign, existing Sunday closing laws were invoked, generally without much success, and additional legislation was sought on that subject.[7] The retail

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[5] See, generally, COMMONS, HISTORY OF LABOUR IN THE UNITED STATES, Vols. I & II (1958); LESCOHIER & BRANDEIS, HISTORY OF LABOR IN THE UNITED STATES, Vol. III (1958); MILLIS & MONTGOMERY, THE ECONOMICS OF LABOR, Vols. I-III (1945). Kirstein relates that, at the 10th annual American Federation of Labor convention in Detroit in December 1890, the Retail Clerks National Protective Association applied for a charter. "The convention was asked to endorse this union, help it organize, and help it abolish Sunday work. The resolution was passed and the union was founded." KIRSTEIN, *op. cit. supra*, at 11.

[6] KIRSTEIN, *op. cit. supra*, at 15-24.

[7] Kirstein reports:

"* * * * In 1897, the Denver, Colorado, local reported that it was planning to have the state Sunday Closing Law tested in the highest court despite the fact that 'recently one of the district judges declared the law unconstitutional.' The Galveston local, after having experienced considerable difficulty in securing enforcement of the state law on this subject, took some violators into the courts, where they were fined $20. From the reports of these efforts, it is apparent that public opinion was indifferent to the Clerks' effort, and few outside the ranks of the union took any interest in the outcome of this continuing fight.

"The Cleveland and Columbus locals, in 1898, sponsored an amendment to the Ohio State Sunday Labor Law which called for closing all stores on the Sabbath. A year later, the Cleveland local sued a merchant, John Alderman, for violation of this law. He was one of a group of West Side merchants, known as 'Seven-Day Businessmen' who refused to sign the Early Closing or the Sunday Closing agreement. When the case was tried, the jury split on the verdict.

"By 1899, the union, apparently feeling that the state laws granted insufficient protection, passed a resolution calling for a Federal Sunday Closing Law. Law suits were brought in various states against merchants who sold goods on Sunday despite the legal prohibition. While the union often won, the amounts that the merchants were fined were so small that the penalty hardly acted as a deterrent to commission of the crime. In one case, a guilty merchant was fined $1 and costs." *Id.* at 20-21.

clerks union found substantial support in their effort to limit work hours and days among proprietors of one-man and family-operated stores as well as among enlightened management which realized that excessive working hours and days not only impaired employee efficiency but also increased overhead.[8] By the time of the beginning of World War II, except for industrial or business activities generally recognized as necessary or essential to our modern-day society, Sunday employment in American business and industry had been gradually reduced to a minimum.

The shortening of the work week, with Sunday generally recognized as a "day off", created additional available leisure time for a large segment of the American working population and resulted in public demand for Sunday public amusement facilities and recreational activities. In response to that demand, most states enacted enabling legislation designed to make available to the public a broad field of amusement and recreational diversions.

The modern-day concept of Sunday as a day of rest, relaxation and recreation, and the appropriateness of legislation to protect that day as such, has recently received judicial recognition by the New Jersey Supreme Court in *Two Guys from Harrison, Inc. v. Furman*, 32 N. J. 199, 215-16, 160 A. 2d 265, 273-274 (1960). In that case Chief Justice Weintraub, speaking for the Court, said:

> "* * * The fact is that Sunday has acquired a special character differentiating it from the other days of the week and this without reference to religious connotation. Today Sunday is many things to many people. It is a day upon which the vast majority of citizens seek respite from the pressures and demands of ordinary routines. To some, it is a day for religious devotion alone. To others, whether or not members of faiths commanding religious observance,

[8] *Id.* at 17.

it is a secular holiday, a day of play, hobbies, recreation or relaxation. To still others, it is a combination of all of these. It is a day for family and friendly reunions. Most people want Sunday for themselves to do as they feel they should, each to prepare himself in his own way to meet the demands of Monday morning.[9]

"Thus the public health and welfare are implicated when the hustle and bustle mount and intrude unreasonably upon opportunities for rest, leisure and diversion. The inroad may be in terms of direct interference as, for example, when commercial activities add to highway traffic to the discomfort of the Sunday driver or otherwise impinge upon a scene conducive to rest, diversion and recreation. The inroad may be indirect but equally real as when those who want to be free on Sunday find the economic aims of their employer compel them to work to hold their jobs, or when the economic impact upon employers requires them and their staffs to remain at the grindstone. Hence we can not say that Sunday may not constitutionally be selected by the legislature in pursuit of a purpose to provide relief from the routine. * * *"

Following the end of World War II, the pre-war concept of Sunday was resumed. Except for activities deemed necessary or essential to our society, industrial and business employment on Sunday was minimal, and the trend toward increased recreational and amusement activities on that day continued.

Then came the 1950's with their spectacular burst of large-scale retail Sunday selling, a business in which

[9] This view finds support among eminent sociologists. See, for example, Margaret Mead, "The Pattern of Leisure in Contemporary American Culture," in Volume 313, *The Annals of the American Academy of Political and Social Science* (1957), reprinted in LARABEE AND MEYERSOHN, MASS LEISURE 10-15 (1958).

unionization of employees is not wide-spread. This development was also described by Chief Justice Weintraub in the New Jersey *Two Guys* case as follows:

> "* * * shortly * * * [after 1951] the scene changed. Retail operations spread rapidly upon highways and Sunday selling mounted dramatically. The urban merchant could not effectively meet the challenge. The major roads, already burdened by non-commercial travel, strained under the added stress. Religious observants of the Lord's Day resented the added hustle and bustle. Economic pressures compelled labor by many who preferred diversion. Thus Sunday closing returned to the stage. Motivations, divergent and internally incongruous, converged upon a single objective. What historically may have been solely a matter of religious concern became a social and economic issue. The [general Sunday closing] statute had not been designed to meet the new problem." 32 N. J. at 209, 160 A. 2d at 270.

See also *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944, 952 (E. D. Pa. 1959).

This change in the Sunday scene brought forth a new rash of legislative activity. To meet the spread of Sunday automobile sales, both New Jersey and Pennsylvania, in common with other states, passed statutes prohibiting the sale of motor vehicles on Sundays and provided for fines sufficient to deter violators.[10] Then Sunday selling broke out in a new area with the rise of large so-called discount houses, which sprang up along suburban and country highways and operate seven days a week, and of latter day "farmers markets", which sell little, if any, farm produce and specialize in evening and weekend

[10] Colo. Rev. Stats., 13-20-1 (1957 Cum. Supp.); Burns' Indiana Stats. Ann., § 10-4305 (1960 Cum. Supp.); Mich. Stats. Ann. § 9.2701 *et seq.* (1959 Cum. Supp.); N. J. Stats. Ann. 2A:171-1.1 *et seq.* (1959 Cum. Supp.); 18 Purdon's Pa. Stats. Ann. § 4699.9 (1959 Cum. Supp.).

operations. These new threats to Sunday as a day of rest, relaxation and recreation for the general public has resulted in the introduction of new legislation in many states in the past few years[11] and in the passage of Sunday retail closing laws not only in Pennsylvania but also in New Jersey and Virginia.[12]

Thus Sunday closing laws are today a part of the legal structure designed to insure a day of rest, relaxation and recreation. The record of our society, as described above, belies the claim of appellants and others that, because of the existence of other statutes regulating working hours, Sunday closing laws could not be genuine "day of rest" laws. None of those other statutes regulating working hours are capable of providing one day of the week which the working man can spend together with his family and friends in relaxation and recreational pursuits. The historical development of American society has been such that Sunday is the logical uniform day. Our courts have long been closed on Sunday, as have other governmental offices, public and private schools, banks, and business offices. Sunday closing laws serve to extend the same benefits to those who work in factories and in retail establishments. A Wednesday off for the retail clerk does not afford him time to spend with his children who are in school and with his friends, and perhaps his wife, who work the traditional five-day week.

[11] Connecticut, 1959 session, S.B. 475, H.B. 3307, H.B. 3768; Florida, 1959 session, S.B. 682, H.B. 2051; Illinois, 1959 session, H.B. 95; Indiana, 1959 session, H.B. 332; Louisiana, 1960 session, H.B. 1337; Maine, 1959 session, H.B. 758; Maryland, 1959 session, S.B. 458; Massachusetts, 1958 session, H.B. 673, H.B. 2666, 1959 session, H.B. 1997; Michigan, 1960 session, S.B. 1050; Mississippi, 1958 session, H.B. 127, 1960 session, S.B. 1595; Montana, 1959 session, H.B. 264; Nebraska, 1959 session, L. 711; New Jersey, 1958 session, A.B. 22, A.B. 152, A.B. 180, 1959 session, S.B. 7, A.B. 25, A.B. 142, A.B. 656; North Carolina, 1959 session, H.B. 829; Ohio, 1959 session, H.B. 300; Pennsylvania, 1959 session, S.B. 405; South Carolina, 1959 session, H.B. 1814; Utah, 1959 session, S.B. 24; Virginia, 1960 session, S.B. 194, H.B. 279; Wisconsin, 1959 Session, A.B. 600.

[12] N.J. Stats. Ann. 2A:171-5.8 *et seq.* (1959 Cum. Supp.); 18 Purdon's Pa. Stats. Ann. § 4699.10 (1959 Cum. Supp.); Va. Code of 1950, § 18.1-358 *et seq.* (1960 Cum. Supp.).

In enacting the 1959 Sunday retail closing law against a background which over the past half century has witnessed the substantial elimination of Sunday employment and the increase of recreational and amusement activities on that day, the clear purpose of the Pennsylvania legislature, as borne out by the natural and reasonable effect of that statute, is to preserve Sunday as a secular day of rest and relaxation.

II. The 1959 Pennsylvania Sunday Retail Closing Law Does Not Constitute an Establishment of Religion in Violation of the Due Process Clause of the Fourteenth Amendment.

Sunday closing laws have been challenged on many occasions on the ground that such legislation constitutes an establishment of religion. In the period since this Court held the due process clause of the Fourteenth Amendment to incorporate the freedom of religion provisions of the First Amendment, this Court has dismissed appeals "for want of a substantial federal question" from three state court decisions upholding Sunday closing laws against such an attack. *State* v. *Kidd*, 167 Ohio St. 521, 150 N. E. 2d 413, *appeal dismissed*, 358 U. S. 132 (1958); *State* v. *Ulner*, 105 Ohio App. 546, 143 N. E. 2d 849 (1957), *aff'd*, 167 Ohio St. 521, 150 N. E. 2d 413, *appeal dismissed*, 358 U. S. 131 (1958); *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), *appeal dismissed*, 341 U. S. 907 (1951).

Recent decisions of other state appellate courts are in accord. *E.g.*, *State* v. *Shuster*, 145 Conn. 554, 557, 145 A. 2d 136, 197-198 (1958); *McGowan* v. *State*, 220 Md. 117, 122-123, 151 A. 2d. 156, 159 (1959), *probable jurisdiction noted*, 362 U. S. 959 (1960); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 215-217, 160 A. 2d 265, 273-274 (1960); *Commonwealth* v. *Bauder*, 14 Pa. D. & C. 2d 571, 576-577, *aff'd p.c.*, 188 Pa. Super 424, 145 A. 2d 915, *allocatur refused*, 188 Pa. Super. xxviii (1958); *State* v.

Grabiński, 33 Wash. 2d 603, 608, 206 P. 2d 1022, 1025 (1949).

Intervening defendant respectfully submits that the above decisions represent the correct view and that the seemingly contrary language in *Crown Kosher Super Market of Mass., Inc.* v. *Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *probable jurisdiction noted*, 362 U. S. 960 (1960), is incorrect. That language apparently does not constitute a holding.[13]

A. The Decisions of This Court Do Not Support Appellants' Contention That Sunday Closing Laws Constitute an Establishment of Religion.

In the last fifteen years, this Court has given the establishment of religion clause full consideration in three cases involving state action alleged to violate the due process clause of the Fourteenth Amendment. Although the encouragement afforded religion was obvious in all three cases, the majority of the Court found an establishment of religion in only the case in which there was active and direct support of religion. *McCollum* v. *Board of Education*, discussed *infra*.

This Court's most detailed pronouncement on the "establishment of religion" clause is found in *Everson* v. *Board of Education*, 330 U. S. 1 (1947). There the majority of the Court found no violation in the use of public funds to reimburse parents for money expended for public bus transportation of their children to Catholic parochial schools as well as to public schools. The Court stated:

[13] The court's opinion on petition for rehearing contains the following language:

"Ground No. 11 objects that there is some inconsistency between the court's decree, which holds the statute unconstitutional merely as applied to petitioners in this case, and the court's opinion, which states that the statute violates the Federal Constitution because it was a statute respecting an establishment of religion. This objection is based upon a tortured reading of one phrase of the opinion torn out of context. It is apparent that the only question argued or considered was the alleged unconstitutionality of the statute as applied to those complaining persons." 176 F. Supp. at 493.

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' *Reynolds* v. *United States*, * * * [98 U. S. 145], at 164.

"We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power. See *Interstate Ry.* v. *Massachusetts*, Holmes, *J.*, * * * [207 U. S. 79], at 85, 88. New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists,

Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

"Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools * * *" 330 U. S. at 15-17.

"This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce* v. *Society of Sisters*, 268 U. S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U. S. at 18.

In the next case, *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), this Court found a violation of the "establishment of religion" clause in the use of public school buildings for "released time" religious instruction

by teachers supplied by the various faiths subject, however, to the approval and supervision of the superintendent of schools. In finding unconstitutionality, this Court concluded:

> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." *Id.* at 212.

In the third and most recent case, *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court found nothing unconstitutional in releasing New York City children during public school hours to receive religious instruction elsewhere pursuant to Section 3210 of the New York Education Law and the regulations thereunder. This Court said:

> "Moreover, apart from that claim of coercion [of which the Court found no evidence], we do not see how New York by this type of 'released time' program has made a law respecting an establishment of religion within the meaning of the First Amendment. * * *" *Id.* at 312.
>
> "In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion." *Id.* at 315.

From these three decisions a clear pattern emerges as to what type of state action violates the "establishment of religion" clause:

> The *Everson* case holds that where the sectarian benefit to be derived is slight compared to the secular objective of the state action, there is no violation.
>
> The *Zorach* case holds that where the only object of the state action is to accommodate the spiritual needs of the people, not even such accommodation is unconstitutional so long as such accommodation is afforded to all religions.
>
> The *McCollum* case holds that where there is direct support of religious institutions, whether selective or universal, as where the tax funds are used, then there is an establishment of religion.

Sunday closing laws clearly come within the first of these three categories, in which category state action is permissible. As discussed above (pages 6-16), Sunday laws have a wholly permissible and legitimate secular purpose—to afford a uniform day of rest, relaxation and recreation for the general public. As pointed out by the New York Court of Appeals in *People* v. *Friedman*, *supra*:

> "It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. * * *" 302 N. Y. at 79, 96 N. E.2d at 186.

The most that can fairly be said against Sunday closing laws is that they make it easier for those belonging to religious faiths which hold worship services on Sunday and who so desire to attend such services. This benefit is an even more incidental one than that con-

sidered valid by this Court in the *Everson* case, where the state paid to have children delivered to the door of the religious institution.

B. Pennsylvania Has Determined That Its Sunday Closing Laws Are "Day of Rest" Statutes.

The 1959 Pennsylvania Sunday retail closing law has been before the Pennsylvania Supreme Court only on an appeal from the dissolution of a temporary injunction. *Rubin* v. *Bailey*, 398 Pa. 271, 157 A. 2d 382 (1960), in which the court did not rule on the constitutional merits of the statute. Taking note of the decision in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), and of the similarity of the Federal and State constitutional provisions, both having been raised in *Rubin* v. *Bailey*, the Court concluded:

> "* * * Obviously, therefore, we cannot say that the court below acted unreasonably in concluding that the presumption of the statute's constitutional validity has not been sufficiently impugned to warrant the continuance of the preliminary injunction." 398 Pa. at 277, 157 A. 2d at 885.[14]

In the only case to reach the Pennsylvania Supreme Court involving the 1939 general Sunday closing law, that Court refused to grant the writ of *allocatur* necessary to review the Superior Court decision upholding the

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[14] By the citation of two Pennsylvania trial court decisions in Philadelphia County, appellants in the present appeal and in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, October Term, 1960, No. 36, imply that Pennsylvania trial courts have uniformly struck down the 1959 Act. They omit any reference to the final adjudication of the Chancellor in *Rubin* v. *Bailey*, which upheld the constitutionality of the statute under both the Federal and Pennsylvania Constitutions and denied injunctive relief. (Pa. C.P., Mont., Nov. Term, 1959, Nos. 28, 34, March 31, 1960).

statute. *Commonwealth* v. *Bauder*, 188 Pa. Super. xxviii (1958).[15]

More than a hundred years ago the Pennsylvania Supreme Court held that the Act of 1794, 3 Sm. L. 177, § 1, the predecessor of the 1939 general Sunday law, was designed to establish a uniform day of rest and not to compel any religious observance. *Specht* v. *Commonwealth*, *supra*, 8 Pa. at 323. Moreover, as noted above, the Pennsylvania legislature has placed both the general Sunday closing law and the 1959 Sunday retail closing law in an article of the Penal Code entitled "Offenses Against Public Policy, Economy and Health."

In *Specht*, the Pennsylvania Supreme Court went on to state with regard to the Act of 1794:

> "It intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences; it compels none to attend, erect, or support any place of worship, or to maintain any ministry against his consent; it pretends not to control or to interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship. It treats no religious doctrine as paramount in the state; it enforces no unwilling attendance upon the celebration of Divine Worship. It says not to the Jew or Sabbatarian, You shall desecrate the day you esteem as holy, and keep sacred to religion that *we* deem to be so. It enters upon no discussion of rival claims of the first and seventh days of the week, nor pretends to bind upon the con-

[15] Section 7[e] of the Act of June 24, 1895, P.L. 212; 17 Purdon's Pa. Stats. Ann. § 190, provides for appeals from Superior Court judgments, among other things, when Federal or State constitutional questions are involved. However, the statute "contemplates only actual, open and unsettled constitutional questions, not so-called questions that have theretofore been raised, fully considered and more than once definitively settled. * * *" *Boyle's Retail Liquor License*, 190 Pa. 577, 579, 42 A. 1025, 1026 (1899).

science of any man any conclusion upon a subject which each must decide for himself. * * *" 8 Pa. at 325.

On this point, we find it necessary to correct what we consider to be a gross distortion of the findings of fact of the three-judge statutory court in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944 (E.D. Pa. 1959), on which the three-judge statutory court in the present case relied. Appellant's brief in the *Two Guys* appeal states that the trial court found as a fact that the purpose of the 1959 Pennsylvania Sunday retail closing law "was to enforce the cessation of work on Sunday in order to commemorate weekly the sectarian religious event and doctrine of the Resurrection of Jesus Christ, the same event and doctrine as are commemorated by the Christian Easter (Rec. 276, 290). * * *" (*Two Guys* brief, p. 5.) This same alleged finding of fact is repeated so frequently in that brief that it becomes the cornerstone of its argument. (*Id.* at 9, 12, 16, 19, 29, 30.)

Those record references are obviously to the following language in the *Two Guys* opinion and supplementary findings of fact. At 276 of the record, the court opinion reads as follows:

> "* * * *The argument* is that this required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ. There is testimony which establishes as a fact in this record that this view of the religious significance of enforced Sunday work stoppage is sincerely held by many persons whose religion does not recognize the divinity or resurrection of Jesus of Nazareth or the sacredness of Sunday as the 'Lord's day'." (Emphasis added.)

In its Supplementary Findings of Fact, the court found:

> "1. Sunday is a day designated for religious services and observances by Christians, with the exception of Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter." (*Two Guys* record, p. 290.)

Those findings and statements by the Court clearly do not constitute an adoption by the trial court of appellant's *argument* in *Two Guys* that the 1959 Act was passed for religious reasons.

Appellants in *Two Guys* also contend that the present case is different from *Friedman* v. *New York*, 341 U. S. 907 (1951), because there is here an explicit finding of religious purpose. (*Two Guys* brief, p. 29.) There is no such finding. All that the Court said on this point was, "The *historical* religious connection is so clear in both state statutes as to be obvious and indisputable." (*Two Guys* record, p. 281, emphasis added.) Moreover, the Court was there referring not to the 1959 Act but to the 1939 Pennsylvania general Sunday closing law. (*Two Guys* record, p. 279-281.)

Appellants contend that all the indicators of the secular purpose of Pennsylvania's 1959 Sunday retail closing law are to be disregarded in favor of finding a religious purpose for that statute because in *Commonwealth ex rel.* v. *American Baseball Club of Philadelphia*, 290 Pa. 136, 143, 138 A. 497, 499 (1927), the Pennsylvania Supreme Court stated:

> "Christianity is part of the common law of Pennsylvania (Updegraph *v.* Com., 11 S. & R. 393) and its people are christian people. Sunday is the holy day among christians. * * *"

Appellants fail to disclose what the court intended when it said, "Christianity is part of the common law of Pennsylvania. * * *" It is most enlightening, therefore, to examine the *Updegraph* case, which was cited for that proposition.

Updegraph involved a conviction for blasphemy, and the court had occasion, as a basis for its decision, to consider the history of the founding of Pennsylvania as a British colony.[10] It will be recalled that Pennsylvania's founder, William Penn, was a Quaker and had been persecuted and imprisoned in England because of his religious beliefs. In recognition of his father's service to the Crown as an Admiral, Penn was granted a charter to found a new colony, which became the Commonwealth of Pennsylvania. Unlike some of the other colonies founded by religious minorities escaping from religious persecution, Pennsylvania did not in turn persecute those with religious convictions and practices contrary to those of the Quakers. The Quakers have not even proselyted but have maintained that each man is entitled to seek his own way to God and to worship as he sees fit.

In the course of the *Updegraph* opinion, the Pennsylvania Supreme Court said the following:

> "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, *William Penn;* not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men. *William Penn* and Lord *Baltimore*

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[10] See, generally, Bolles, Pennsylvania Province and State; Vol. II (1899); Dunaway, A History of Pennsylvania (1935); Graeff, The History of Pennsylvania (1944); Keith, Chronicles of Pennsylvania, Vol. I (1917).

were the first legislators who passed laws in favour of liberty of conscience; for before that period the principle of liberty of conscience appeared in the laws of no people, the axiom of no government, the institutes of no society, and scarcely in the temper of any man. Even the reformers were as furious against contumacious errors, as they were loud in asserting the liberty of conscience. And to the wilds of America, peopled by a stock cut off by persecution from a Christian society, does Christianity owe true freedom of religious opinion and religious worship. * * *" 11 S. & R. 394, 400 (Pa. 1824)

"As I understand this writ of error was taken out with a view to decide the question, whether Christianity was part of the law of the land, and whether it was consistent with our civil institutions, I have considered it a duty to be thus explicit. No preference is given by law to any particular religious persuasion. Protection is given to all by our laws. It is only the malicious reviler of Christianity who is punished. By general Christianity is not intended the doctrine of worship of any particular church or sect; the law leaves these disputes to theologians; it is not known as a standard by which to decide political dogmas. The worship of the Jews is under the protection of the law. * * * It is not now, for the first time, determined in this court, that Christianity is part of the common law of Pennsylvania. In the case of the *Guardians of the Poor* v. *Greene*, 5 Binn. 555, Judge BRACKENRIDGE observed, the church establishment of *England* has become a part of the common law, but was the common law in this particular, or any part of it, carried with us in our emigration and planting a colony in Pennsylvania? Not a particle of it. On the contrary, the getting quit of the ecclesiastical establishment and tyranny, was a great cause of the emigration. All things were reduced to a primitive

Christianity, and we went into a new state. And Chief Justice TILGHMAN observes, that every country has its own common law; ours is composed partly of our own usages. When our ancestors emigrated from *England*, they took with them such of the *English* principles as were convenient for the situation in which they were about to be placed. It required time and experience to ascertain how much of the *English* law would be suitable to this country. The minds of *William Penn* and his followers would have revolted at the idea of an established church. Liberty to all, preference to none; equal privilege is extended to the mitred Bishop and the unadorned Friend.

"This is the Christianity which is the law of our land, and I do not think it will be an invasion of any man's right of private judgment, or of the most extended privilege of propagating his sentiments with regard to religion, in the manner which he thinks most conclusive. * * *" *Id.* at 408-409.

It is thus apparent that the recognition of "Christianity" as "part of the common law of Pennsylvania" is not an establishment of any Christian church or its doctrinal tenets but acceptance of the right of the individual to unfettered religious freedom, which doctrine formed the foundation for the First Amendment guarantee. It is the same belief which led Thomas Jefferson, a deist, to write the following language, quoted by this Court in its *Everson* decision, 330 U. S. at 12-13, in the preamble to the "Virginia Bill for Religious Liberty":

"Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either * * *;

that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern. * * *"

C. The Fact That Sunday Closing Laws May Originally Have Been Passed, and May Still Be Supported by Some Legislators, for Religious Reasons Is Irrelevant.

In the *Everson* case this Court stated:

"* * * The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." 330 U. S. at 6.

As has been pointed out above, Sunday closing laws have long been recognized as having a legitimate public purpose. The fact that legislators in the past have enacted such legislation because of religious motivation, or that some legislators even today support Sunday closing laws for the same reason, is irrelevant. This Court has not adopted, but has firmly rejected, any doctrine of unconstitutionality by association.

The question of legislative motive came before this Court in the classic case of *Soon Hing* v. *Crowley*, 113 U. S. 703 (1885). That case involved a San Francisco, California, ordinance regulating the establishment and maintenance of public laundries and wash-houses. The section of the ordinance under attack prohibited the washing and ironing of clothes between the hours of 10 p.m. and 6 a.m. and on Sunday. The defendant, who

was Chinese, attacked the ordinance principally on the ground that it was aimed at his race, "and not for any sanitary, police, or other purpose." The Court rejected that argument, holding that it could not inquire into legislative motive and stating:

> "* * * There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretence." *Id.* at 710-11.

This Court has continued to adhere to that view. See, *e.g.*, *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 224 (1949), wherein the Court upheld a statute prohibiting individuals and companies from engaging in both the life insurance and undertaking businesses, stating:

"It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality. * * *

"We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop."

In passing, it is interesting to note that at the public hearing on the bill which became the 1959 Pennsylvania Sunday retail closing law, those speaking in favor included six labor leaders and seven representatives of business interests. Of the five clergymen and representatives of religious groups who spoke in favor, only one based his stand on religious reasons.[17]

D. The Coincidence of a Legislatively Established Common Day of Rest, Relaxation and Recreation With a Day of Religious Worship Does Not Constitute an Establishment of Religion.

Appellants are left only with the contention that the coincidence of the legislatively established common day of rest, relaxation and recreation with a day of Christian worship invalidates the 1959 Pennsylvania Act. That fact makes it easier for such persons to meet their religious obligations, but it can be asserted without fear of contradiction that many Christians do not believe that their religion requires them to refrain from working at their usual businesses on Sunday.

Coincidence of civil obligations with religious obligations is by no means uncommon and, in many areas of

[17] Transcript of Public Hearing Before House Rules Committee, re Senate Bill 405 (June 24, 1959).

conduct, almost unavoidable. However, that fact does not convert a statutory prohibition into an establishment of the religion which similarly commands. *Hennington* v. *Georgia*, 163 U. S. 299, 304 (1896); *State* v. *Shuster*, 145 Conn. 354, 557-558, 145 A. 2d 196, 197-198 (1958); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 215-216, 160 A. 2d 265, 273-274 (1960); *People* v. *Friedman*, 302 N. Y. 75, 79-80, 96 N. E. 2d 184, 186 (1950), *appeal dismissed*, 341 U. S. 907 (1951); *State* v. *Kidd*, 167 Ohio St. 521, 524-525, 150 N. E. 2d 413, 416-417, *appeal dismissed*, 358 U. S. 132 (1958). A great many of the limitations on conduct in our society in fact have their roots in the Judaeo-Christian tradition. It is inconceivable that the state could not prohibit certain types of conduct because such conduct was already prohibited by the Ten Commandments, or because it was prohibited by one religion but not by another, *e. g.*, polygamy condemned by Judaism and Christianity but approved by Mohammedanism and others. The applicable cases are discussed below in Section III-B of this brief in connection with prohibition of the free exercise of religion.

The selection of Sunday as a uniform day of rest is wholly logical in terms of the evolution of our culture. It is unquestionable that most Americans regard Sunday as a day when they should not be required to work. See *Two Guys from Harrison, Inc.* v. *Furman*, quoted at pages 12-13, *supra*. With the spread of the five-day week, most office workers and factory employees regard Saturday in the same vein. To try to select a uniform day of rest outside of the weekend would require a complete uprooting of our culture's weekly timetable.

Finally, enforcement is facilitated by the selection of a uniform day and one which coincides with the religious commands of some sects. The Pennsylvania court in *Commonwealth* v. *Bauder*, 14 Pa. D. & C. 2d 571, *aff'd p. c.*, 188 Pa. Super. 424, 145 A. 2d 915, *allocatur refused*, 188 Pa. Super. xxviii (1958), stated:

"If the day of rest chosen is one which the great majority of people are already bound by conscience to observe, the State will have the sanction of conscience as well as the fear of punishment as a motive for enforcement of its policy of relief from labor. Everyone connected with the enforcement of law can testify to the support given to the maintenance of law and order by those who obey the law from conscience rather than from fear of punishment.

"It can be readily seen that selecting a specific day greatly aids in the enforcement of the law. If a person is found engaging in worldly employment on a Sunday, he is guilty. He is also more conspicuous and easier to detect than he would be if others were legally employed in the same occupation on that day. To permit a person to rest on a day of his own choice would compel the Commonwealth to prove which was the day of his choice and that he had not rested on that day or if he had no day of his own choice to prove that he had worked on each of the other six days of the week. Any such requirement would practically nullify the law." 14 Pa. D. & C. 2d at 579, 145 A. 2d at 919.

III. The 1959 Pennsylvania Sunday Retail Closing Law in No Way Prohibits the Free Exercise of Religion in Violation of the Due Process Clause of the Fourteenth Amendment.

Appellants here are not seeking religious freedom at all, but economic freedom. Appellants contend that, because they have voluntarily sacrificed the business opportunities of Friday night and Saturday in recognition of their religious obligations, they should be afforded an opportunity on Sunday to recoup a portion of those losses even though Pennsylvania has validly determined that Sunday shall be the uniform day of rest, relaxation and recreation.

There are, to the knowledge of intervening defendant, only two cases in which Sunday closing laws have heretofore been challenged on the ground that such legislation prohibits the free exercise of religion: *Friedman* v. *New York*, 341 U. S. 907 (1951), wherein the appeal was summarily dismissed for want of a substantial federal question; and *Crown Kosher Super Market of Mass., Inc.* v. *Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *probable jurisdiction noted*, 362 U. S. 960 (1960). Appellants' attempt to distinguish the *Friedman* case factually (Appellants' brief, p. 15) can be of no constitutional aid to their position. Intervening defendant respectfully submits that the decisions of this Court in *Friedman* and of the court below in the instant case are correct, and that the contrary conclusion in the *Crown Kosher* case is erroneous.

A. Economic Sacrifices Voluntarily Made for Religious Reasons Should Not Excuse One From the Uniform Application of State Laws.

The question here presented is remote from any considered by this Court in its many decisions involving the free exercise of religion. It is appropriate, therefore, before turning to the decided cases, to dissect appellants' argument to determine whether enforcement of the 1959 Pennsylvania Sunday retail closing law against appellants in fact presents an issue of freedom of religion.

Appellants' argument is as follows: as Orthodox Jews they are obligated to observe the Jewish Sabbath and to close their retail stores on Friday evening and Saturday, during which time their competitors enjoy their greatest sales volume; the 1959 law prohibiting Sunday retail selling prevents appellants from recouping at least a portion of the business which they lose by closing on the Jewish Sabbath; this loss of business will be sufficiently substantial to require them to make a choice between abandoning their business or abandoning their religion; the statutory imposition of this choice constitutes an

unconstitutional abridgement of the free exercise of Orthodox Judaism. By the same reasoning, appellants contend that Orthodox Judaism will be unconstitutionally hindered in its ability to compete with other sects for adherents.

The facts of this appeal do not fall within the usual type of restraint upon religion, if they constitute a restraint at all. There is clearly no state interference in the usual sense with religious beliefs, with the advocacy thereof, with attendance at religious services, or with adherence to any practices dictated by the appellants' religion. All that Pennsylvania has done is to require enterprises other than those which are necessary, charitable, or recreational, to close on Sunday under penalties which are severe in the case of retail establishments selling certain commodities.

In determining whether the 1959 Pennsylvania Sunday retail closing law truly impinges upon appellants' religious freedom, four observations are pertinent:

1. The familiar litigated restraints upon religion fall equally upon all members of the complaining religious sect. Here, however, the statutory impact is not upon Orthodox Jews as such but only upon an economically defined segment of that sect—retail merchants.

2. The statute applies to the retail sale of the described commodities without regard to the religion of the seller. Retailers other than strict Sabbatarians, *viz.*, Two Guys from Harrison, complain in the companion Pennsylvania case now before this Court[18] that enforcement of the 1959 Act will render their enterprises unprofitable.

3. Appellants have chosen a business in which Friday night and Saturday are described by them as "the best shopping evening and shopping day," and their chosen religion prohibits labor during this period. This "competitive disadvantage" of loss of Friday night and

[18] *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, October Term, 1960, No. 36.

Saturday business would be present whether or not there was in force a Sunday retail closing law.

4. The "compulsion" which appellants complain the 1959 Pennsylvania Sunday retail closing law visits upon them is by no means unique to Sunday closing laws but can result from the application of many general laws to any individual whose conduct is already regulated by religious convictions. For example, it exists for the Catholic who, for religious reasons, supports a private school system while also being compelled by the state to support a public school system.

By attempting to equate the loss of business resulting from state prohibition of Sunday retail selling with their own voluntary sacrifice of Friday night and Saturday business, appellants only confuse the issues of this case. When appellants' argument is analyzed, it is clear that they urge only that, because they find it difficult to meet the financial sacrifices imposed by their religious obligations, the community interest in a uniform day of rest and recreation should be set aside. This Court should reject that argument and hold that sacrifices voluntarily assumed for religious reasons do not excuse one from the application of otherwise proper statutory regulation.

B. The Decisions of This Court Do Not Support Plaintiffs' Contention That There Is Here a Prohibition on the Free Exercise of Religion.

While none of this Court's decisions involving free exercise of religion is directly in point, those decisions nonetheless clearly demarcate the respective areas over which church and state have controlling jurisdiction. The "wall of separation between church and State" erected by the First Amendment is not like "one-way" glass, designed to operate in one direction only. "* * * The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from reli-

gious interference. * * *'" *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947). It is the position of intervening defendant that the adoption of appellants' argument will breach the wall of separation and exalt church over state, thereby restricting the state's power to legislate for the public welfare.

Since appellants cannot charge Pennsylvania with their loss of business during the Jewish Sabbath, our analysis must be in terms of the loss of Sunday business which would result from the enforcement against appellants of the 1959 Pennsylvania Sunday retail closing law. Logically, the constitutional question of free exercise of religion would arise only if the Jewish religion required appellants to work either six days a week or expressly on Sundays.[12] Even under those circumstances, the decisions of this Court hold that the prohibition would not be unconstitutional. *A fortiori*, Sunday work in which appellants indulge only because they close their shops during the Jewish Sabbath cannot conceivably rise to the stature of a constitutionally protected religious right. The fact that Sunday closing may result in financial loss does not entitle appellants' custom to greater constitutional protection.

This Court has consistently held that religious practices—as opposed to religious beliefs and the propagation thereof—must yield to social policies embodied in legislation. Otherwise, "the professed doctrines of religious

[12] In appellant's brief on appeal in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, October Term, 1960, No. 36, there is quoted from Dr. Sidney B. Hoenig's testimony in that action language which implies that Orthodox Jews are required to work at their usual occupations six days a week (*Two Guys* brief, p. 4a). This implication was dispelled on cross-examination, including questions from Judge Hastie (*Two Guys* record, pp. 76-79). And at pages 77-78, Dr. Hoenig stated:

> "If he [the Orthodox Jew] has enough funds to support himself that is his own private recognition, he can do whatever he pleases, he doesn't have to work all week. The only thing he has to do something of a gainful value for society. He has to do something, even on a Sunday, for the promotion of the weal and comfort of the entire group."

belief [would be] superior to the law of the land, and in effect . . . [would] permit every citizen to become a law unto himself." *Reynolds* v. *United States*, 98 U. S. 145, 167 (1878).

The *Reynolds* case and *Davis* v. *Beason*, 133 U. S. 333 (1890), sustained sanctions on the practice of polygamy against attack by Mormons. Since the statutes challenged were federal acts for the government of territories, First Amendment guarantees of religious freedom were applicable and were considered by the Court. In *Davis* this Court confined the protection afforded by the free exercise clause to *religious beliefs*—relations between man and his God—as opposed to particular practices of individual cults or sects:

> "* * * With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. * * *" *Id.* at 342-343.
>
> "* * * the only question that remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. * * *" *Id.* at 344.

In *Hamilton* v. *Board of Regents*, 293 U. S. 245 (1934), this Court sustained regulations of state land grant colleges requiring male students to participate in military training. Justices Cardozo, Brandeis and Stone, concurring, assumed that First Amendment guarantees were made applicable to the states by the Fourteenth Amendment. Mr. Justice Cardozo, author of the concurring opinion, stated:

> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were thus extended, might refuse to contribute taxes in furtherance of a war, * * * or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. * * *" *Id.* at 268.

The several cases subsequently decided by this Court involving the "free exercise" clause in no way derogate from the principles enunciated in the *Reynolds* and *Davis* cases and restated by the Mr. Justice Cardozo, concurring, in *Hamilton* v. *Board of Regents*. "The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth [citing the *Davis* and *Reynolds* cases, *inter alia*, in a footnote]. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make prohibitions of the First applicable to state action abridging religious freedom. * * *" *Everson* v. *Board of Education supra*, 330 U. S. at 14-15.

In *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), for example, this Court upheld an ordinance requiring licensing of street parades against a freedom of religion attack by Jehovah's Witnesses on the ground that the ordinance was a valid exercise of the police power to control city streets. There was "[n]o interference with religious worship or the practice of religion in any proper sense. * * *" *Id.* at 578. See also *Cleveland* v. *United States*, 329 U. S. 14, 20 (1946), where this Court summarily rejected a religious freedom attack on the application of the Mann Act to members of a "fundamentalist" Mormon sect practicing polygamy.

From these decisions of this Court, it seems clear that even if Orthodox Judaism *required* its adherents to work at their usual employment on Sunday, Pennsylvania could constitutionally prohibit such a religious practice if contrary to the community interest in a uniform day of rest.[20] Here, however, the alleged religious interference is even more remote. Appellants admittedly are attempting only to recoup on Sunday the sales they lose by closing on Friday night and Saturday. (Appellants' brief, p. 14.) No decision of this Court has ever suggested that, when individuals make economic sacrifices for religious reasons, the Federal Constitution requires the state in general legislation to reward them with an exemption.

It is appropriate at this point to quote from this Court's opinion in *Zorach* v. *Clauson*, *supra*:

> "It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any." 343 U. S. at 311.

[20] *Amici* concede that "religious conviction in seven days' labor weekly would not render unconstitutional a statute requiring one day rest in seven." (*Amicus* brief, p. 29.)

C. Neither the "Clear and Present Danger" Test Nor Any Other Special Standard of Constitutionality Is Applicable Here.

Both appellants (Appellants' brief, pp. 18-19, 24-29) and *amici curiae* Synagogue Council of America and National Community Relations Advisory Council (*Amicus* brief, pp. 29-32) urge that the "clear and present danger" test must be applied in determining the constitutionality of the 1959 Pennsylvania Sunday retail closing law. It is the position of intervening defendant that the clear and present danger test is not properly applied in this case. First, the 1959 Pennsylvania retail closing law imposes no constitutionally cognizable interference with appellants' freedom of religion to which the test might be applied; and, second, the clear and present danger test is to be applied only to direct statutory interference with religious beliefs and the expression thereof.

Appellants do not assert that their religion requires them to keep their shops open on Sunday. It is not contended by them that the alleged religious interference results from the fact that their shops must close on Sunday. Rather it is interference with their Sabbath observance of which appellants complain. We respectfully urge that the "compulsion," or temptation if you will, for appellants to abandon Sabbath observance by opening their shops on Friday night and Saturday stems, not from any legislative interference with appellants' religious freedom, but from the fact that appellants are economically or financially motivated to avoid the sacrifices which their religion requires. Appellants' financial and economic motivation cannot transform an otherwise constitutional secular statute into one impinging upon religious freedom. The clear and present danger test has no application in such a situation.

This Court has never applied the clear and present danger test in a case which involved only the issue of

freedom of religion. We do not say that freedom of religion is subject to any less protection than is afforded by other First Amendment guarantees, but only that by its very nature religious worship (man's beliefs and relations with his God), as distinguished from religious practices or activities, does not create any "danger."

With one exception, the decisions cited by appellants and *amici* in which this Court has applied the "clear and present danger" test did not involve religious freedom.[21] The one exception is *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), where Jehovah's Witnesses challenged the compulsory flag salute. This Court, however, did not its decision on religious grounds, but held that the compulsory salute violated freedom of speech in the form of political expression.

It may well be that, as in the *Barnette* case, when the exercise of religious freedom directly involves free speech, press, or assembly, the clear and present danger test might apply. All but one of the decisions of this Court in those areas have not reached that question because they have involved *arbitrary* refusals to permit the distribution of religious literature[22] or the holding of outdoor religious meetings in public places.[23] However, in *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), this Court ignored an opportunity, and thereby presumably refused, to make the clear and present danger test applicable to freedom of religion. In that case, a Jehovah's Witness sent a minor ward into the streets to sell religious pamphlets and was convicted for violation of a child-labor law. On appeal, the Witness relied on freedom of religion alone, *id.* at 164, and urged the absence of any clear and present

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[21] *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Schenck* v. *United States*, 249 U. S. 47 (1919).

[22] *Tucker* v. *Texas*, 326 U. S. 517 (1946); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Largent* v. *Texas*, 318 U. S. 418 (1943).

[23] *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951).

danger to the child from such activity, *id.* at 167. Without any further mention of that test, this Court found the state's interest in the welfare of children controlling.

The guarantee afforded by the First Amendment freedom of religion entitles one to worship as he sees fit, and to preach about, and proselyte on behalf of, his religion. However, when acts or practices are involved which the state has concluded are undesirable, the fact that they may be religiously approved, or even encouraged, does not authorize their commission.

Appellants completely ignore the "worship-practice" dichotomy long recognized by this Court in its decisions circumscribing the limitations upon freedom of religion. *Amici*, however, concede that the religious freedom guaranteed by the Federal Constitution "does not embrace absolute 'freedom to act' and that all conduct 'remains subject to regulation for the protection of society'", citing *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). (*Amicus* brief, p. 29). In that case, although this Court struck down a statute requiring a permit before soliciting funds for a religious cause on the ground that the statute lodged arbitrary power in the issuing official, it recognized that "even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. * * *" *Id.* at 306. This Court also recognized the power of a state to regulate the time and manner of solicitation in the interest of public safety, peace, comfort or convenience. *Id.* at 306-307.

Appellants also suggest (Appellants' brief, p. 17) that the prohibition of Sunday retail selling as enforced against them is the equivalent of a direct tax such as was stricken down by this Court in *Follett* v. *McCormick*, 321 U. S. 573 (1944). But that case and similar license tax cases (*Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943)) are in a class by themselves and hold that there cannot be a direct tax upon the exercise of a First Amendment right. This is wholly apart

from any clear and present danger test. Those cases struck down licensing taxes imposed on door-to-door salesmen as applied to Jehovah's Witnesses distributing religious literature. This Court exempted the Witnesses on the theory that the venture was *not principally commercial* but rather religious. Even if Sunday retail closing laws could be regarded as a "tax", it is clearly a "tax" on commercial ventures which applies irrespective of the religion of the retailer.

None of the authorities cited by appellants, and no decision of this Court, so much as suggests that legislation prohibiting conduct not directly related to speech, press and assembly must be justified by the showing of a clear and present danger in order to establish its constitutionality. Were that the requirement, the applicability of the "clear and present danger" test would be determined not by the type of activity sought to be regulated but by whether the activity were approved or encouraged by a particular religious group.

Apart from "clear and present danger," appellants argue that the rationale of the famous footnote 4 in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153 (1938), requires that "more exacting judicial scrutiny" be given to the present statute. In that case, as emphasized by appellants, this Court suggested that statutes "directed at particular religious, * * * or national, * * * or racial minorities" require "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than * * * most other types of legislation" and that "prejudice against discrete and insular minorities may be a special condition, * * * which may call for a correspondingly more searching judicial inquiry."

It is evident that such considerations can have no application here because the 1959 Pennsylvania Sunday retail closing law is not "directed at particular religious * * * [or any other] minorities." Nothing could make that fact clearer than the companion case now before this

Court which also challenges the 1959 Pennsylvania Act, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, October Term, 1960, No. 36. In that case, the three-judge District Court, in an opinion by Circuit Judge Hastie, described the 1959 Act as follows:

> "* * * In the present record it appears and we find that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that of the plaintiff [a seven-day discount house operation] initiated and triggered new and rather large scale violations, and threats of others. It also appears in the testimony which is part of the legislative hearing on the bill which became the 1959 amendment of the Sunday closing law, that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute. It is probable that such considerations influenced the legislature's 1959 decision to make Sunday retail selling the subject of a new prohibitory enactment. * * *" 179 F. Supp. at 952.

It is obvious that, contrary to appellants' assertion (Appellants' brief, p. 29), the events described by Judge Hastie are highly relevant to the present case. In light of those events, the 1959 Pennsylvania Sunday retail closing law cannot conceivably be described as legislation "directed at particular religious * * minorities." The test of the *Carolene Products* footnote does not become applicable to a statute of general application simply be-

cause those affected include minority groups. Otherwise, the applicability of the test would be determined not by the character of the legislation in question but by the nature of its protagonists in the particular litigation.

IV. The 1959 Pennsylvania Sunday Retail Closing Law Does Not Create Unreasonable Classifications in Violation of the Equal Protection or Due Process Clause of the Fourteenth Amendment.

On this point, appellants in the present appeal rely upon the brief filed by appellants in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, October Term, 1960, No. 36. Appellants in the latter action and *amici curiae* Synagogue Council of America and National Community Relations Advisory Council contend that the 1959 Pennsylvania Sunday retail closing law is unconstitutionally arbitrary in its coverage because it prohibits only sales at retail and then only of certain commodities. Moreover, it is urged that the exemption from the general Pennsylvania Sunday closing law of certain sports and amusement activities underscores the absurdity of the 1959 Act because it undermines the "uniform day of rest" rationale.

Having urged that Sunday closing laws are basically religious, *amici curiae* here and appellant in the *Two Guys* case then argue that the only rational "day of rest" statute would be one which imposed a puritanical Sunday. That argument has the virtue of consistency but overlooks completely the fact indicated in Section I of this brief that the Sunday which is now sought to be protected is not a religious holiday but rather a secular holiday, not only for rest and, if one so desires, religious worship, but also for relaxation and recreation, including attendance at professional athletic events and movies or a Sunday drive simply to see the countryside or to visit friends and places of interest.

The opposing *amicus* brief and appellant's brief in *Two Guys* seem to imply in their quotation of *Commonwealth* v. *Cavalerro* (Pa. Q. S., Phila., April 20, 1960) (*Amicus* brief, p. 35-36) that there is nothing illegal in the sale of commodities other than those specified in the 1959 Act. That is not so. The 1939 general Pennsylvania Sunday closing law prohibits all "worldly employment or business," except only "works of necessity and charity."[24] The difference between the 1939 statute and the 1959 Act is that the general law imposes only a nominal fine, whereas the 1959 Act provides for more substantial penalties.

Intervening defendant urges not only that it is unnecessary for the legislature to observe mathematical niceties in classification and that appellants bear a heavy burden to prove unconstitutional arbitrariness, but also that there is, in fact, a rational basis for the selectivity of the 1959 Act, whether that statute be considered as supplementary to the general Pennsylvania Sunday closing law or wholly apart therefrom.

A. Appellants Have the Burden of Proving the Unreasonableness of a Classification, and a Statute Will Not Be Held Unconstitutional on That Ground Unless There Is No Conceivable Reasonable Basis for the Classification.

The law with regard to the types of classification which are considered to work unreasonable discriminations, and therefore to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,

[24] The commodities covered by the 1959 Act previously came within the ambit of the general Sunday closing law. Under the decisions of the Pennsylvania courts, to the extent that 1959 Act overlaps the general Sunday closing law, the new statute repeals the earlier one, leaving the latter in force as to activities not covered by the new law. *Commonwealth* v. *Brown*, 346 Pa. 192, 197, 29 A. 2d 793, 796 (1943); *Commonwealth* v. *Gross*, 145 Pa. Super. 92, 21 A. 2d 238 (1941). See also *Commonwealth* v. *Shimpeno*, 160 Pa. Super. 104, 50 A. 2d 39 (1946).

is clear. In *Morey v. Doud*, 354 U.S. 457, 463-464 (1957), this Court, quoting from *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), pointed out that the Equal Protection Clause prohibits only "invidious discrimination." The Court then quoted the rules set forth in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-9 (1911):

> "* * * 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. * * *"

B. Sunday Closing Laws Which Classify on a Commodity Basis, as Does the 1959 Pennsylvania Act, Have Been Almost Universally Sustained.

As noted above, the attack made on the 1959 Pennsylvania Sunday retail closing law is a two-pronged one based on both the limitation of the statute to the retail sale of certain commodities and the exclusion from the general Pennsylvania Sunday closing law of various sports and amusements. The basic flaw in the argument is that it fails to recognize that the 1959 Act treats in the same fashion all who sell the same commodity at the same level

in the channels of distribution. This is probably the reason why this Court has in the last decade dismissed appeals for want of a substantial federal question from every challenge to Sunday closing laws on a classification basis. *Grochowiak v. Pennsylvania*, 358 U. S. 47 (1958); *Ullner v. Ohio*, 358 U. S. 131 (1958); *Gundaker Central Motors v. Gassert*, 354 U. S. 933 (1957); *Towery v. North Carolina*, 347 U. S. 925 (1954); *Friedman v. New York*, 341 U. S. 907 (1951).

The argument that Sunday legislation is discriminatory when it fails to prohibit *all* worldly employment and business activities was rejected by the Pennsylvania Supreme Court in *Bothwell* v. *City of York*, 291 Pa. 363, 140 A. 130 (1927). That case involved a municipal ordinance which prohibited certain amusements on Sundays while permitting others. The Court stated:

> "The council of York selected amusements which in its discretion it considered proper to prohibit by ordinance on the Sabbath day, and the weight of this enactment falls alike on all persons convicted of engaging in such unlawful operations. The ordinance discriminates against no persons or class of persons and surely it is not for appellant to say that the ordinance is void because it does not prohibit other acts equally mischievous as the acts prohibited. * * * The discriminations open to objection are those where persons engaged in the same business are subjected to different restrictions, or held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the law. *Soon Hing* v. *Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145." 291 Pa. at 370-371, 140 A. at 132.

A similar unsuccessful attack was made on the Pennsylvania Act prohibiting only the showing of movies

on Sunday, except when approved by local option, in *Commonwealth* v. *Grochowiak*, 184 Pa. Super. 522, 136 A. 2d 145, *allocatur refused*, 184 Pa. Super. xxvii (1957), *appeal dismissed*, 358 U. S. 47 (1958). The Court stated:

> "There is no merit in the contention that appellant has been denied due process and equal protection on the ground that the Act is discriminatory in its terms because it fails to include in its subject matter all worldly amusements on Sunday, subjecting them to a prohibition similar to that against the showing of motion pictures. *Bothwell* v. *York City*, 291 Pa. 365, 370, 140 A. 130. The appellant has relied on the principle of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064. That decision was considered in *People* v. *Orreck et al.*, 158 P. 2d 186 and the argument of a denial of equal protection of the laws was discarded in this language: 'Here the claimed discrimination is that those engaged in horse race betting are being prosecuted while those who run other types of illegal betting establishments are not. Such type of discrimination, if discrimination it be, is not within the rule of the above cases. It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not.' The discussion in *Bothwell* v. *York City*, *supra*, p. 370, is to the same effect.
>
> "Finally there is no merit in the contention that the Act works an unreasonable classification. The relevant governing principles are stated in *Seabolt* v. *Commissioners*, 187 Pa. 318, 323, 41 A. 22, thus: 'Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subject classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the classification

void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification.' That is a correct statement of the present law in Pennsylvania. Cf. *Garrett* v. *Turner*, 235 Pa. 383, 389, 84 A. 354; *Nat. Transit Co. et al* v. *Boardman*, 328 Pa. 450, 197 A. 239." 184 Pa. Super. at 527-28, 136 A. 2d at 148.

In other jurisdictions considering the constitutionality of similar Sunday legislation, the overwhelming number of courts have found that the classifications made by specific statutes and by exceptions to general statutes do not violate the Equal Protection Clause. See, *e.g.*, *Lane* v. *McFadyen*, 259 Ala. 205, 66 So. 2d 83 (1953); *State* v. *Shuster*, 145 Conn. 344, 143 A. 2d 196 (1958); *State* v. *Hurliman*, 143 Conn. 502, 123 A. 2d 767 (1956); *Humphrey Chevrolet* v. *City of Evanston*, 7 Ill. 2d 402, 131 N. E. 2d 70 (1956); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960); *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), *appeal dismissed*, 341 U. S. 907 (1951); *State* v. *Kidd*, 167 Ohio St. 521, 150 N. E. 2d 413, *appeal dismissed*, 358 U. S. 132 (1958); *State* v. *Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949). See also 50 Am. Jur., Sundays and Holidays § 11 (collecting cases).

In almost all of the few decisions which have held Sunday laws unconstitutional, the statutes involved classified the exemptions by businesses rather than by commodities. *Elliot* v. *State*, 29 Ariz. 389, 242 Pac. 340 (1926); *Gaetano Bocci & Sons Co.* v. *Town of Lawndale*, 208 Cal. 720, 284 Pac. 654 (1930); *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1937); *Denver* v. *Bach*, 26 Colo. 530, 58 Pac. 1098 (1889); *Henderson* v. *Antonacci*, 62 So. 2d 5 (Fla. 1952); *City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N. E. 2d 52, 119 A. L. R. 747 (1938); *Ex parte Hodges*, 65 Okla. Crim. 69, 83 P. 2d 201 (1938); *Broadbent* v. *Gibson*, 105 Utah 53, 140 P. 2d 939

(1943). The discrimination between, for example, a grocery store which is not allowed to open, and a fruit stand which is allowed to open and sell the same items which would be available in the grocery store, is readily apparent.

City of Springfield v. *Smith*, 322 Mo. 1129, 19 S. W. 2d 1 (1929), cited by *amici*, turns on a special constitutional provision which, according to the court, made inapplicable opinions in other jurisdictions holding that the legislature is the judge of wisdom of classifications. 322 Mo. at 1138, 19 S. W. 2d at 3-4. The Missouri Constitution prohibited special laws where general laws could be made applicable and expressly gave the determination of the latter fact to the courts. 322 Mo. at 1138, 19 S. W. 2d at 4.

The *Smith* decision is significant, however, in its rejection of the position taken by some courts that a statute which does not prohibit all activities except matters of charity and necessity is not legitimate day of rest legislation. *E. g., Kelly* v. *Blackburn*, 95 S. 2d 260 (Fla. 1957); *Ex parte Ferguson*, 62 Okla. Crim. 145, 70 P. 2d 1094 (1937); *Gronlund* v. *Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948); and the two Philadelphia trial court opinions relied upon by appellants in the *Two Guys* case. That question is fully treated below in Section IV-D of this brief.

C. The 1959 Pennsylvania Sunday Retail Closing Law Is Not Rendered Unreasonably Discriminatory by Reason of the Fact That It Imposes Heavier Penalties for Violation Than the General Pennsylvania Sunday Closing Law.

As is apparent from appellants' Amended Complaint, the "discrimination" about which appellants are most concerned is the fact that the 1959 Pennsylvania Sunday retail closing law imposes heavier penalties than does the Pennsylvania general Sunday closing law. In fact, the penalties under the new statute are sufficient, if enforced,

effectively to deter violators. As pointed out by appellant in the *Two Guys* case, disparate fines are also imposed by other Pennsylvania statutes regulating particular activities on Sunday. (*Two Guys* brief, p. 11.) The number of those disparities is of no particular importance and neither increases nor decreases the reasonableness of the imposition of heavier fines on appellants' activities by the 1959 Act.

Differential fines imposed by Sunday statutes were specifically upheld against similar challenges as long as 60 years ago. *State* v. *Hogriever*, 152 Ind. 652, 53 N. E. 921 (1899); *Sherman* v. *Mayor, and Aldermen of City of Paterson*, 82 N. J. L. 345, 82 A. 889 (1912). More recently, the Supreme Court of Indiana considered the same attack upon a statute prohibiting automobile sales on Sunday and again found nothing unreasonable in the fact that that statute imposed more substantial penalties than Indiana's general Sunday law. *Tinder* v. *Clarke Auto Co.*, 238 Ind. 302, 149 N. E. 2d 808 (1958). The Indiana court relied, *inter alia*, on the opinion of the late Chief Justice Vanderbilt of the New Jersey Supreme Court in *Gundaker Central Motors* v. *Gassert*, 23 N. J. 71, 127 A. 2d 566 (1956), *appeal dismissed*, 354 U. S. 933 (1957). That opinion contains a comprehensive discussion of the question of classification with regard to the New Jersey Sunday automobile sales act, which discussion is equally applicable here:

> "The fact that the sale of motor vehicles is singled out for legislative treatment is no ground for complaint if there is any reasonable basis for such action, [citing cases]. And there is reasonable basis if the buying and selling of motor vehicles on Sunday has effects inimical to the public good and welfare. Under the police power 'the State may protect its citizens from physical and moral debasement which comes from uninterrupted labor'; see State *v.* Fair

Lawn Service Center, Inc., *supra*, 20 N. J. 468, 474, 483, 120 A. 2d 233, 241 (1956).

"In the present state of Sunday activity in this automotive age, there are sections of our highways stretching for miles almost exclusively devoted to the sale of new and used cars, where the owners and employees, forced by the unreasonable and competitive lust of some of their neighbors in the trade, are compelled to maintain their business vigil every day of the week and for long hours; who can say that this is not inimical to the public good? Moreover, common human experience has shown to all who have had the occasion to drive on the highways of this State that even a single business enterprise can constitute an insidious accident hazard when the highway on which it is situated is full with superpowered automobiles. Multiply this one instance by the number of dealers that are found, let us say, in the Little Ferry-South Hackensack area and see what the potential havoc is, to say nothing of the peace and tranquility that is incidentally disturbed.

"The State has an absolute right to enter here and force on all and every one so engaged regulations for the benefit of the public, and it is not for the court to say that its action in doing so is contrary to the constitutional provisions against discrimination merely because there are classes similarly situated with respect to public or social evils requiring similar legislation that are yet unregulated, Raymond *v.* Township Council of Teaneck, *supra*, 118 N. J. L. 109, 191 A. 480 (E. & A. 1937); Hertz Washmobile System *v.* Village of South Orange, 41 N. J. Super. 110, 124 A. 2d 68 (Law Div. 1956). As we have already indicated, the Legislature has a wide range of discretion in the choice of the means and methods by which it shall enhance the public good and welfare, Amodio *v.* Board of Commissioners of Town of West New York.

supra, 133 N. J. L. 220, 225, 43 A. 2d 889 (Sup. Ct. 1945)." 23 N. J. at 81-83, 127 A. 2d 572-3.

D. Rational Bases Exist for the Classification Made by the 1959 Pennsylvania Sunday Retail Closing Law.

1. The 1959 Act Strikes at an Area of Flagrant Violation of the Pennsylvania General Sunday Closing Law.

In recent years the small penalty imposed by the Pennsylvania general Sunday closing law led certain retail merchants to conclude that it would be profitable to flaunt that law. Those merchants decided that, inasmuch as most of the working population would be enjoying a day of rest, they could be enticed from their homes and recreation and into retail shops and shopping centers. In fact, the very existence of the Sunday closing laws created the largest number of potential buyers of any day of the week and the greatest opportunity for increased sales and profits.

It became apparent to the legislature that this increasing commercial activity on Sunday, the traditional day of rest, relaxation and recreation, was becoming a growing evil which soon would destroy the public good which the legislature sought to achieve through the Sunday closing laws. This evil first evidenced itself on a large scale in Sunday automobile sales.

As a result of Sunday sales by certain automobile dealers, other dealers who had obeyed the Sunday closing laws and remained open only six days of the week found it a competitive necessity likewise to flaunt the law. The result was that nearly all retail automobile dealers opened for business on Sunday. In order to combat this situation, the Pennsylvania legislature passed the Act of July 8, 1957, P. L. 565 §1, 18 Purdon's Pa. Stats. Ann. §4699.9, imposing substantially heavier fines on the sale of motor vehicles and trailers on Sundays. That statute has had no effect on the number of vehicles sold, but simply has

insured that in that business Sunday will be preserved as a day of rest, relaxation and recreation for employees.

The next major threat to Sunday as a day of rest, relaxation and recreation was the tremendous growth in retail selling of clothing, furniture, appliances, and certain other articles of personal property. Again, the economic effect of such operations ultimately would have been to force competitors who had previously observed the general Sunday closing law likewise to remain open seven days a week in order to meet this unlawful competition. In 1959 the legislature met this threat to Sunday rest, relaxation and recreation by the enactment of the statute attacked in this appeal.

With regard to the 1959 Pennsylvania Sunday retail closing law, the three-judge court in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944, 952 (E. D. Pa. 1959), found that "the circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action." As appears from the opinion as quoted above at page 45, the record showed a chain reaction to the recent opening of "substantial suburban retail businesses" on Sunday and the ineffectiveness of the general Sunday closing law, with its $4 fine, to deter such violators.

As stated by Mr. Justice Douglas in *Williamson* v. *Lee Optical Company*, 348 U. S. 483, 487-488 (1955):

> "• • • [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

2. Viewed Independently, the 1959 Act Prohibits Activities Which Impede Sunday Recreation

The "Sunday driver" is a well known phenomenon of modern America. The automobile conveys one to the

homes of relatives and friends, to the ball park, the movies, the seashore, and points of interest, or may be simply a means for escape from city and suburban developments into the countryside. The heavy volume of such Sunday traffic is well known to all. As pointed out above, the 1959 Pennsylvania Sunday retail closing law is aimed at commodities sold by large suburban retailers as well as by appellants. It is a matter of common knowledge, confirmed by the record in the *Two Guys* case, that such enterprises draw thousands of additional automobiles to one spot and create their share of traffic jams on already clogged highways on Sundays.

Appellants in the *Two Guys* Pennsylvania appeal, on which appellants here rely, complain of the differing treatment of wholesale and retail sellers of the same commodities. There is, in the first place, no suggestion that wholesalers have been engaging in Sunday selling to any extent. Moreover, the nature of business operations is such that wholesaling involves far fewer employees and customers in handling a given volume of goods than does retailing. For those reasons, Sunday operation of wholesale houses would neither involve as many employees nor create the traffic problems large-scale retail operations do.

Complaint is also made of an explicit exception from the 1959 Pennsylvania Sunday retail closing law, which prohibits the sale, among other things, of "* * * toys, excluding novelties and souvenirs. * * *" Adequate answer was given by the Virginia Hustings Court of the City of Richmond in *Mandell* v. *Haddon* (slip opinion, pp. 14-15, Aug. 9, 1960) in testing exactly the same exception in the 1960 amendment to the Virginia general Sunday closing law:

> "'With respect to 'toys', no doubt there can be a difference of opinion, particularly when 'novelties and souvenirs' are excluded. What the Legislature has really said here is that 'novelties and souvenirs' are

not 'toys', and indeed in the strict sense they are not. 'Novelties and souvenirs' are items casually purchased by the tourist or traveller as a permanent remembrance of his visit to a particular place (perhaps on a Sunday), to preserve and gaze upon with enjoyable recollection at a future date—something quite distinct from a 'toy' to be gradually or quickly worn out by the busy occupation of a child. And if a certain item is called a 'novelty or souvenir' by a store owner simply to evade the statute when in fact the item is a 'toy', the sale is prohibited and the statute is violated."

The exclusion of "novelties and souvenirs" thus serves to enhance public recreation in terms of Sunday visits to points of interest, whereas the commodities covered by the 1959 Pennsylvania Act can be conveniently purchased at other times.

Two Guys from Harrison, Inc. v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960), involved the 1959 New Jersey Sunday retail closing law. For reasons peculiar to the statutes there involved, the New Jersey Supreme Court held that the 1959 law completely superseded the New Jersey general Sunday closing law. Judge Burling, concurring, succinctly stated:

"* * * it is not apparent on the face of the statute that it is not a reasonable means of achieving a valid legislative goal: to free the highways from traffic caused by commercial activity to an extent sufficient to allow their unobstructed use by persons seeking relaxation." 32 N. J. at 237, 160 A. 2d at 285.

Chief Justice Weintraub, speaking for the Court, went into more detail:

"We have already described the evil to which the earlier Sunday legislation was addressed. The Constitution, of course, does not confine the Legislature to that conception of the evil. The Legislature may

take a different view of the scene and find the evil to be an impairment of public health, safety, morals and welfare, not because of the impact of uninterrupted labor, but rather because of unreasonable interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for that purpose. Such is the conception of the evil which reasonably may be inferred from the title and terms of Chapter 119.

"The reasonableness of the classification of what may and may not be sold must be judged in the light of that conception of the evil. Upon that basis, classifications may be made which would be inadmissible where the purpose is to compel a day of rest. The legislative body may upon that approach classify operations upon such considerations as the amount of traffic, noise, or other bustle, and weigh those factors against, not necessity or charity, but rather relative utility or convenience to the public. See *Hertz Washmobile System* v. *South Orange, supra* (41 N. J. Super. at 122-23).

"Here the broad power to classify discussed in *Holderman, supra* (24 N. J. at 300-305), comes into play. In the absence of a compelling showing to the contrary, we must assume, as the facts may reasonably be, that the Legislature found the items dealt with by Chapter 119 are the ones which, above and beyond all others, are provocative of the problem; that the elimination of their sale on Sunday will remove the undue interference with the opportunity of the citizens for relief from the stress of everyday pursuits. Upon the stated thesis, the Legislature may indeed hit the evil where it is felt most in its quest for a reasonable balance of the interests involved. It may, as it did in *Gundaker Central Motors* v. *Gassert, supra* (23 N. J. 71), thus proceed in a single field, the sale of automobiles, without compulsion to search out

the evil everywhere. *Cf. Amodio* v. *Board of Commissioners of W. New York*, 133 N. J. L. 220 (Sup. Ct. 1945). It may, as in the case of Chapter 119, attack the problem in a wider sphere if it finds the evil there warrants legislation in the public interest. The Legislature may proceed experimentally, cautiously, step by step, until it finds the solvent. We must uphold a classification unless it is plainly demonstrated to be capricious. The required showing is not made merely by contrasting items which may and may not be sold. The relative utility of such items may be wholly unrelated to the degree of Sunday activity which their sale incites and to the relief which a ban upon them will accomplish. Nor would it be fatal if incongruities or problems of construction should develop in fringe areas. The Constitution does not demand mathematical perfection. *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340, 96 L. ed. 367, 371 (1952). * * *" 32 N. J. at 228-229, 160 A. 2d at 280-281.

See also *City of Springfield* v. *Smith*, *supra*, 322 Mo. at 1141-1142, 19 S. W. 2d at 6.

CONCLUSION.

For the above reasons, intervening defendant Pennsylvania Retailers' Association respectfully requests this Court to affirm the decision of the court below.

Respectfully submitted,

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IN THE

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Appellants,

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Appellees.

BRIEF OF *AMICUS CURIAE*, NATIONAL RETAIL MERCHANTS ASSOCIATION

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BRIEF OF *AMICUS CURIAE*, NATIONAL RETAIL MERCHANTS ASSOCIATION

I. Interest of the National Retail Merchants Association, *Amicus Curiae*

The National Retail Merchants Association ("Association") is a voluntary trade association of retail department, chain and specialty stores organized in 1911 under the provisions of the membership corporations law of the State of New York. In the United States the members of the Association operate more than 11,500 stores, both large and small. Association members also operate stores in 40 foreign countries. Members of the Association do an annual volume of business in the United States in excess

of 19 billion dollars and employ more than a half million persons.

The retail industry provides the final and essential link in placing in the hands of the consumer the necessities of life, as well as the myriad of other goods and services necessary for the maintenance and enhancement of the nation's well-being. In terms of people gainfully employed the retail industry ranks second in size in the United States,[1] and constitutes an important and vital segment of our national economy.

More than one-half of the total volume of department, chain and specialty stores (excluding food and food products) in the United States are made by members of the Association. It is therefore readily apparent that legislation affecting shopping hours and shopping days for retail stores is of vital interest to the Association's members and employees.

This brief is submitted by the Association with the written consent of all parties. The brief has been filed in this case rather than in any, or all, of the other Sunday law cases now before this court because the consents of the parties in this case were readily granted. It is believed, however, that the principles stated herein are generally applicable to all the pending cases.

II. Argument

The parties to this action and the other Sunday law cases now before this court have discussed at length the question whether prohibiting the retail sale of commodities on Sunday constitutes the establishment of religion or prohibits the free exercise thereof within the meaning of

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[1] Department of Labor, Bureau of Labor Statistics; Production of Non-Supervisory Workers in Non-Agricultural Establishments by Industry, August, 1960, Volume 83, No. 8, p. 884.

the First and Fourteenth Amendments of the Constitution of the United States. We shall not here discuss those issues, except to state that we believe that in our present-day society Sunday closing laws represent a proper exercise of state police power to establish a uniform day of rest, and do not in any way constitute the establishment of religion or interfere with the free exercise thereof in contravention of the Federal Constitution.

The interest of this Association in the issues presented by the pending Sunday law cases does not stem from any religious consideration. Its members include not only persons of the Christian faith but persons of other faiths, including Judaism, and perhaps persons of no faith. The interest of the Association and its members in these cases is purely economic and social. We are keenly aware of the impact which Sunday business operations have upon the health and welfare of our employees, most of whom are women and many of whom are married, and the communities in which they live and work, and we are much concerned about the effect which seven-day-a-week operations will have upon the economic position of the retail industry.

Since the recent increase in Sunday retail operations, the Association has taken formal action opposing these activities by retailers. On January 14, 1959, the annual meeting of the National Retail Merchants Association voted unanimously to adopt the following resolution:

> "We believe that all stores should be closed on Sunday except those engaged in selling articles absolutely necessary to the health and welfare of the community. We therefore urge that stores permitted by law to transact business on Sunday for the purpose of selling articles of necessity be strictly limited to the sale of such articles, and we urge that retailers support legislation for this purpose."

On January 13, 1960 the membership of the National Retail Merchants Association reaffirmed its position on Sunday

closings by the adoption of a resolution substantially identical with the resolution approved in 1959.

The social benefit to be derived from uniform day of rest statutes has been fully considered in an *amicus* brief filed in this action on behalf of the Retail Clerks International Association, AFL-CIO. The arguments presented in this brief, therefore, will be confined to the economic impact of seven-day-a-week operations.

Despite the manifest importance of the retail industry in the American economic scheme, it is beset by many economic problems. One of the major problems of most of the industry has been the constant struggle to maintain a sufficient profit margin to continue in business and meet the needs of our expanding population and economy. For the year 1959 department store profits throughout the United States based on volume averaged 2.85% after taxes. The record of earnings in the department stores for the four prior years were: 1958—2.75%; 1957—2.80%; 1956—3.10%; 1955—2.85%.[2] For the same years, profits of specialty stores were even lower: 1958—1.4%; 1957—1.4%; 1956—1.6%; 1955—1.55%.[3]

One of the fundamental causes for this low margin of profit is the keen competition which exists throughout the industry as evidenced in many areas of operations. In the matter of business hours and shopping days, for example, retail stores are competitively sensitive to the operations of other stores in their community. Failure of one store to open when his competitor is open means loss of business during that period. The result has been that in most areas competing retail stores traditionally observe substantially uniform opening and closing hours. Since

[2] *Operating Results of Department & Specialty Stores in 1959*; Harvard Business School, Division of Research, Boston, Mass., p. 7.

[3] *Ibid.*, p. 21.

1950, however, there has been an increasing tendency in many areas for some retail stores to operate on Sunday, many in disregard of statutes which prohibit retail sales on that day except for necessary and essential items. Although most retail stores have continued to remain closed on Sunday in compliance with existing statutes, the burgeoning of Sunday retail sales has in the past decade imposed steadily increasing competitive pressure upon retailers who traditionally have not opened on that day. While it is true that until now the number of retail stores which maintained illegal Sunday operations is not in the majority, they are steadily increasing in size and number, and the competitive situation is such that if Sunday closing laws are held invalid it is inevitable that competing retail stores will be forced to open on Sunday in their struggle for the consumers' dollar.

It is believed that if legal sanction is given to Sunday operations of retail stores the result will be to increase overhead expenses of the retail industry generally, with no increase in total weekly sales, and a consequent further reduction of profit margins. Obviously retail stores now open on Sunday enjoy a temporary advantage over stores which remain closed on that day. If Sunday closing statutes are set aside, however, competition in the retail industry will force most other retail stores to open on Sunday, the sales volume of each store will return to normal, and the initial advantage of the present Sunday operators will disappear. The significant fact is that there will be no increase in the volume of sales by reason of the additional shopping day, but there will be additional overhead expense, particularly by reason of increased payroll expense. It is the prevailing practice among NRMA member stores to pay overtime for work performed on Sundays or holidays.

It is believed, in other words, that Sunday store opening will simply spread the sum total of dollars available for

consumer goods over seven days of operation instead of six days. The effect will be to drive marginal retailers out of business, and, in an uneconomic way, either to reduce the profit margin of those stores which survive, or to cause increased costs being passed on to the consumers.

Sunday openings are likely to have another adverse effect upon the retail industry in its program of personnel recruitment. Americans generally, at the professional, executive and employee level, are showing an increasing disinterest in long hours of work. As one scholar has stated,[4] it appears "a general decline is occurring in the zest for work * * *." This author has pointed out that there is evidence of an increasing reluctance on the part of young people to enter upon professional or business careers which demand night work and weekend hours. Sunday operations will further impair the long-range personnel recruitment aims of the retail industry. If the retail industry is to continue to serve the people of an expanding society, it must be able to attract able young men and women without the added burden of the socially distasteful seven-day-a-week operation.

We respectfully submit that while the problems of longer work week for retail employees, reduced profits for the retail industry, and difficulty of personnel recruitment, which are likely to arise if Sunday retail selling is to be forced upon our society, are peculiar to the retail industry itself, these problems are only concurrent symptoms of greater and more widespread evils which will result if Sunday becomes "just another day" of the business week. The broad sociological implications of irregular work schedules have been discussed in the brief of the Retail Clerks.

To permit, and in effect competitively to require, retailers to engage in widespread Sunday operations would

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[4] David Reisman, *Leisure and Work in Post-Industrial Society in Mass Leisure*, edited by Larabee & Meyersohn, pages 375-376.

effectively uproot this day as the one day of the week which traditionally has been recognized and preserved as a day of rest and relaxation in most communities throughout our nation. Our customs have established, and our legislatures and courts have decreed, that a uniform day of rest, on which all but essential commercial activities cease, is in the interest of the health and welfare of our society.

III: CONCLUSION

The Court should affirm the judgment of the court below.

Respectfully submitted,

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v.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia, *Appellees*

BRIEF FOR APPELLEES

On Appeal from the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. §2281 et seq.

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I.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the enforcement of the Pennsylvania Act of August 10, 1959, P. L. 660, which prohibits Appellants from conducting their retail businesses on Sunday, constitute an unconstitutional interference with the free exercise of religion on the ground that since Appellants observe the Saturday sabbath as required by their faith and refrain from commercial activity thereon, the closing of their businesses on Sunday, as well, would exert economic pressure upon them to engage in commercial activity on Saturday?

2. Does the Pennsylvania Act of August 10, 1959, P. L. 660, constitute a law "respecting an establishment of religion" within the prohibition of the due process clause of the Fourteenth Amendment to the United States Constitution on the ground that by prohibiting the retailing on Sunday of selected commodities, the Act prefers and protects certain religious sects?

3. Does the Pennsylvania Act of August 10, 1959, P. L. 660, violate the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution by prohibiting the retailing on Sunday of certain commodities and not others?

II.
SUMMARY OF ARGUMENT

The enforcement of the Pennsylvania Sunday Closing Law, which prohibits the retailing of certain commodities, does not interfere with Appellants' free exercise of religion within the ban of the First and Fourteenth Amendments. The Appellants, Orthodox Jewish merchants conducting businesses affected by the Act, are not seeking protection of their undoubted right to practice their faith, for the operation of their businesses is no part of their religion. To the contrary, they seek only protection of a privilege to carry on their profit making enterprises free from State regulation.

Appellants argue that compulsory Sunday closing works substantial financial injury upon them because they are required by their faith to abstain from commercial activity on the Saturday sabbath as well. Such economic pressure may, they contend, induce them to keep their stores open on Saturday, thereby violating cardinal principles of their theology.

Assuming this to be so, it affords no excuse for their non-observance of the statute. The economic hardship of which they complain falls equally upon entrepreneurs who, although permitted by their faith to engage in the daily operation of their businesses, nevertheless depend upon Sunday trade for their profit. To except Appellants from the observance of the Sunday Closing Law, but not merchants of other religions, would prefer and protect a particular religious sect to the detriment of other faiths in violation of the very constitutional commandment Appellants seek to invoke.

On the other hand, the impartial application of the Pennsylvania Act to all retail establishments coming within its purview will not constitute support of certain Christian sects by honoring their holy day and encouraging worship thereon. In view of the limited scope of the Sunday Closing Law under consideration, such a characterization

strains the imagination. In purpose and effect, the legislation speaks to matters economic and not religious. The Act springs from the desire of the citizens of Pennsylvania for a community day of rest and relaxation. The intense competitive conditions prevalent in certain types of retail businesses prevent entrepreneurs from achieving this result by individual action. Legislative regulation is necessary. That the valid social objective sought might be attained by other legislative means is not material to the determination of the constitutionality of the present Act. Once the Legislature has spoken, the wisdom of their selection is not the subject of judicial review.

Clearly, the challenged statute is not a law "respecting an establishment of religion," nor by its reasonable classification of certain commodities whose sale it prohibits does it otherwise violate the Fourteenth Amendment to the Constitution of the United States.

III.

ARGUMENT

1. THE ENFORCEMENT OF THE ACT OF AUGUST 10, 1959, P. L. 660, WHICH PROHIBITS APPELLANTS FROM CONDUCTING THEIR RETAIL BUSINESS ON SUNDAY, DOES NOT UNCONSTITUTIONALLY INTERFERE WITH THE FREE EXERCISE OF THEIR RELIGION EVEN ASSUMING ARGUENDO THAT THE CLOSING OF THEIR BUSINESS ON SUNDAY WOULD EXERT ECONOMIC PRESSURE UPON THEM TO ENGAGE IN COMMERCIAL ACTIVITY ON THE SATURDAY SABBATH.

The Colonial history of religion in America is the familiar recounting of intoleranee; quarrelsome religious sects, each secure in its own verity, sought by civil sanction to enforce their beliefs, and loosed bigotry upon the land. Tithes and taxes were by agents of the state collected. Those who upon occasion omitted to worship on a Sunday

in the chosen church of one colony were, for the first offense, subject to loss of communal allotment; for the second, to be whipped; and for the third offense to be put to death. Opinions out of tune with the melodic score of the Word of God, played according to prevailing fashion, were as rankest heresy punished.[1] Only slowly, painfully slowly, did the cause of religious freedom, indeed, the cause of religious toleration, championed by a few free thinkers in a few states, develop and spread.[2] So it was that even at the time of the adoption of the Constitution, five states still maintained established churches, while five others had but recently discarded their state religions;[3] the proponents of liberty of conscience had daily to do battle.

The First Amendment, therefore, with its guarantee against Federal prohibitions upon the free exercise of religion, stemmed as much from a desire for protection against a feared hegemony of dominant religious organizations in other states as it did from deep-seated philosophical and intellectual convictions favoring liberty of conscience. Nonetheless, the First Amendment achieved at least this much: A bastion of religious freedom was withdrawn from the ambit of national legislative action. Matters of conscience were dressed in shield and panoply, proof against congressional invasion. Forever free from official restraint were beliefs in and expression of religious

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1. See *Reynolds v. United States*, 98 U.S. 145, 162-63 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); See also discussion in Zollman, American Church Law, pp. 4-8 (1933); Johnson, The Legal Status of Church-State Relationships in the United States 237 (1934).

2. Foremost of these were Thomas Jefferson and James Madison. See 8 Jeff. Works 113.

3. In 1787, Massachusetts, Connecticut and New Hampshire still retained their Congregational, and Maryland and South Carolina their Church of England establishment. Only shortly before had New York, New Jersey, Virginia, North Carolina and Georgia gone through the process of disestablishing their church. See Zollman, op. cit. supra at p. 4.

opinions even though they be contrary to established doctrines of the day or, indeed, unbelievable in themselves. Forever free from compulsory exactions for the support of any religious organization was the property of all men. Forever free from compulsory church attendance were the persons of all citizens. Forever free from legislative let or hindrance were the rites and ceremonies of all faiths.[4] These, then, were the enduring protections inseparably attached to the very structure of the organic law of the land, and applicable to the states through incorporation in the guarantees of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

How fare Appellants' contentions in the present case when tested against these principles of religious freedom established by the First and Fourteenth Amendments? Can it be said that the enforcement of the Pennsylvania Act of August 10, 1959, P. L. 660, by preventing Appellants from operating their retail businesses on Sunday, so interferes with the free exercise of their religion that it invades the area reserved from official action by these constitutional safeguards?

Appellants' religion does not require them to engage in any commercial activity on Sunday; much less does it adjure them to conduct a retail business that requires for its profitable operation sales on six days including Sunday. So much Appellants concede. (Appellants' Brief, p. 29) But, having done so, they are in no better position to complain than those who, although not required by their faith to cease from business activity on Saturday, or indeed, any day, nevertheless depend upon Sunday sales for the successful operation of their enterprises. *Cf. Two Guys from Harrison-Allentown, Inc. v. McGinley*, No. 36, October Term, 1960.

The case made out by Appellants for interference with their free exercise of religion amounts to no more

4. *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890).

than this: By cumulative effect, a legislative restriction upon an individual's conduct, which is in addition to a similar restriction voluntarily adopted by an individual in obedience to the dictates of his faith, may work a substantial economic hardship upon the individual, inducing him to give up the command of conscience. This financial pressure upon the individual to abjure the tenets of his religion is said to be the responsibility of the statute and turns the Act into an instrumentality of interference with the free exercise of religion within the ban of the First and Fourteenth Amendments.

Their case must fail. The religious scriptures of this world are filled with "Thou shalt nots," and if constitutional competence to enforce legislative prohibitions can be made to depend upon the non-existence of similar but additional interdictions in articles of faith, each man's belief would be the measure of his civil obedience. But, observance of the civil law cannot be made subservient to observance of the canonical; the protection of the First and Fourteenth Amendments does not reach so far.[5]

Far different by nature and effect upon religious freedom is the present statute from the ordinance considered by this Court in *Follett v. Town of McCormack*, 321 U. S. 573 (1944). There, the Court struck down the imposition of a business license tax upon an evangelist of Jehovah's Witnesses, engaged in the door to door selling of religious tracts and books, on the ground that the tax was laid upon the practice of his faith. This was so because although Follett was dependent for his living upon his calling, he was nevertheless engaged in a "religious" rather than a "commercial" venture. (Id. at 575) Follett could not therefore be made "to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." (Id. at 578)

It seems difficult to escape the impression that the

5. *Cf. Reynolds v. United States*, 98 U.S. 145, 166-67 (1878); *Davis v. Beason*, 133 U.S. 333 (1890):

real objection of Appellants here is to economic loss and not infringement of religious scruples. Religion is being employed by these Appellants as an excuse for insulating themselves from the financial hardship which even the irreligious might equally suffer under the Pennsylvania Sunday Closing Law. The "exercise" which is protected by the Constitution is surely the exercise, without commercial motives, of freedom of worship.[6]

By way of extension of their principal argument, Appellants press the contention that not only will they be tempted to give up their good standing as Orthodox Jews in order to avoid financial harm, but also that their faith would itself be hindered in its efforts to attract and maintain as adherents those persons who might be engaged in similar businesses operating under similar conditions. This objection cannot be sustained because the underlying necessary factual premises are singularly absent from the instant record. This Court is asked to assume that Orthodox Judaism is a proselytizing faith, desirous of gathering within its fold even those of little faith who would be induced by the type of hardship here asserted to give up their religion. We must speak out against the acceptance of so unwarranted an assumption.

Passing beyond this consideration, we come to the very heart of the issue and challenge the right of these five merchants even to maintain such an argument. By what authority do Appellants presume to speak for organized Orthodox Judaism? They are not, and do not claim to be, duly constituted officials or representatives of this faith charged with such responsibility. We submit that under the averments of their amended complaint, Appellants lack

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6. *Follett v. Town of McCormick*, 321 U.S. 573 (1944). *Cf. Otten v. Baltimore & Ohio R. R. Co.*, 205 F. 2d 58 (2d Cir. 1953), (L. Hand, J.—Employees are not excused from joining a union as required under a union shop contract because of religious scruples.). Compare *Zorach v. Clauson*, 343 U.S. 306, 311 (1952); (Mr. Justice Douglas: "It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case.")

the standing necessary to raise this question. *Cf. Doremus v. Board of Education*, 342 U. S. 429 (1952).

In view of the foregoing, the further question which Appellants pose—whether legislation which has the effect of abridging the free exercise of religion must successfully pass judicial examination as to the existence of "a clear and present danger" to a vital public interest—is not reached on this appeal. But see, *Prince v. Massachusetts*, 321 U. S. 158 (1944); *Cox v. New Hampshire*, 312 U. S. 569 (1941); *Cantwell v. Connecticut*, 310 U. S. 296 (1940). Appellants have failed to establish a present or threatened State interference with their religious practices.

For like reason, it is unnecessary to consider whether the present Act is to be subject to the "more exacting judicial scrutiny" enunciated in *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938). Appellants have also failed to establish that the Pennsylvania Sunday Closing Law is aimed at "particular religious . . . minorities" or that prejudice directed against such minorities so undermines the workings of the traditional political processes that they cannot be relied upon to afford protection.

It is sufficient for purposes of withstanding constitutional attack that the Pennsylvania Act is one which serves a public purpose. See *Brief of Retail Clerks International Association, AFL-CIO, amicus curiae*. In this connection, we need dwell but briefly on Appellants' argument that business on Sunday is a piece of "cultural pluralism" deserving of preservation at the expense of public desire for a uniform Sunday closing law. Whatever the merits of their philosophical contention, it is addressed to the wrong forum. The choice of competing social policies is made by the Legislature, not the Courts. And, once the Legislature has made its decision, even though unwisely, there the matter ends.

2. THE ACT OF AUGUST 10, 1959, P. L. 660, DOES NOT CONSTITUTE A LAW "RESPECTING AN ESTABLISHMENT OF RELIGION" WITHIN TH" PROHIBITION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; THE PROHIBITION UPON RETAILING ON SUNDAY OF SELECTED COMMODITIES DOES NOT PREFER NOR PROTECT CERTAIN SECTS TO THE PREJUDICE OF OTHERS.

The First Amendment's withdrawal of Congressional power to make laws "respecting an establishment of religion" was grounded in Colonial experience with that aspect of European political societies which has become known as "clericalism"—the lending of civil authority to ecclesiastical rules and the creation of an interstitial official hierarchy of State and Church. By purpose and careful design, the Amendment erected a wall of separation between Church and State. *Reynolds v. United States*, 98 U. S. 145, 164 (1878).[7]

The broad sweep of the Amendment carries beyond the interdiction of a national religion. It speaks equally against the preferment of one religion over another. Congress might not compel acceptance of the beliefs of one faith nor the renouncing of the heresies of another. It might not insist upon contributions for the support of one denomination, nor prohibit tithing for the aid of another. It might not require attendance at the church of one persuasion, nor proscribe admission to that of another. *Everson v. Board of Education*, 330 U. S. 1, 15-16, 18 (1947); *McCollum v. Board of Education*, 333 U. S. 203, 210-211 (1948). And, this power, which was forbidden to Congress, has, through the Fourteenth Amendment, likewise been prohibited to the legislatures of the several states. *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

How stands, then, the Pennsylvania Sunday Closing Law in relation to this great constitutional prohibition?

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7. See also Zollman, American Church Law p. 7 (1933).

This statute does not prohibit the ceremonial practices or disallow the theology of one denomination, nor does it sanction those of another faith. It does not compel church attendance on Sunday, nor does it prevent such formal religious observance upon any other day. It does not deny the validity of the claims of those who consider the seventh day of the week to be the true sabbath and day of rest, nor does it lend legislative support to the claim of any sect which believes that Sunday is a holy day.

Nonetheless, the Appellants have labored to develop that general Sunday laws throughout history[8] were enacted by their creators for the sole purpose of aiding the established Christian religion in its efforts to sanctify Sunday as a Holy Day, free from the taint of secular activities. So conceived, the reason for the law failing, they argue, the law itself should fail. Instead of which, they observe, the laws have been perpetuated by the making up of new reasons. These are the so-called "latter day rationalizations."

However, what Appellants have failed to perceive in adopting the old arguments of the Sabbatarians is that they now tilt at windmills. It may very well be that the historic objective of Sunday legislation was to sanctify the "Lord's Day" in deference to dominant Christian theology. The passage of the centuries, and especially the rapid industrialization of the past fifty years, however, has worked a marked change in the concept of "Sunday" observance. The first day of the week is now a secular institution. To the religious and the irreligious alike, Sunday, as a community day of rest and relaxation, has become a part of their everyday pattern of living. Indeed, it may truly be said that there is scarcely an aspect of our national social, commercial and political life which has not accommodated

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8. Retail activities on Sunday seem to have been singled out for special treatment even under the Saxons. Marketing on Sunday was enjoined by Alfred of Wessex circa 878 A. D., and by Aethelstane circa 924 A.D. Lewis, Sunday Legislation 71-73 (1902); Johnson, The Legal Status of Church-State Relationships in the United States at 234 (1934).

itself to the concept of Sunday as a "day off".[9] See *Brief of Retail Clerks International Association, AFL-CIO.*

While this charge might be attributable, in part at least, to the enforcement of Sunday legislation here complained of, surely it is too late now to reassess the whys and wherefores of a custom so widely held. Sunday practices, as they exist today, may be accepted at their face value without reference to the cause of their creation. Until the present litigation, the Courts throughout the country were unanimous in upholding Sunday statutes as civil legislation establishing a uniform day of rest on a day which would involve the least inconvenience to the overwhelming majority of citizens.[10] *Soon Hing v. Crowley*, 113 U. S. 703 (1885); *Hennington v. Georgia*, 163 U. S. 299 (1896); *Petit v. Minnesota*, 177 U. S. 164 (1900); *Specht v. Commonwealth*, 8 Pa. 321 (1848).

Nothing daunted, Appellants continue their attack upon the Pennsylvania Sunday Closing Law here under consideration and argue that by purpose and effect the Act protects and prefers certain Christian sects by honoring the Christian holy day, the Lord's Day, and encouraging Christian worship on that day.[11] But, to claim so much from an Act which is concerned only with the retailing of

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9. As this Court knows, public agencies, including the Court itself, cease their normal activities, and even the President is not expected to exercise his daily duties on Sunday. Constitution, Article I, Section 7. Familiar also to this Court are the provisions commonly found in labor agreements for premium pay for Sunday labor.

10. Cases Collected, 83 C.J.S., Sunday, Sec. 3 (1953). Sunday laws are enforced in at least 47 states. Czarra, Sunday Statutes in a Modern Comunity, 61 Yale L.J. 247 (1952); Note, 73 Harv. L. Rev. 729, 732-33 (1960).

11. So far from being an aid to church attendance, compulsory Sunday rest laws have been denounced by some ministers as being responsible for the growth of the Sunday leisure industry which competes with the church for the patronage of the public and makes for what, according to some, is profanation rather than devotion.

selected commodities on Sunday overtaxes the imagination.

The Act of August 10, 1959, P. L. 660, cannot be so characterized. Economic, rather than religious, considerations gave rise to the statute.[12] For want of such legislation, because of the intensity of competition prevailing in certain types of retail businesses, individual entrepreneurs were being compelled to operate on a seven-day week. Further, that inequality of bargaining power between individual employee and employer, with which this Court is familiar, was responsible for so-called "white collar", clerical and sales personnel being forced to accept Sunday labor if they were to obtain work at all.[13] To remedy this condition, the present statute was enacted.

To the argument that the Legislature might have achieved its purpose by requiring the affected retail businesses to close on one day a week without specifying the particular day, it is sufficient to answer that the wisdom of the legislative choice is not the subject of judicial review. The existence of alternative methods of accomplishing a legitimate social goal does not invalidate the particular means the Legislature has selected. In regulating retail businesses and employment to accommodate the wishes of the majority of the citizens of this Commonwealth, the Legislature performed a civil function which does not offend the prohibition against the making of a law respecting an establishment of religion.

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12. See, e.g., The Pittsburgh Press, August 2, 1959, p. 24, col. 1; Transcript, Public Hearing S. B. 405 before House Rules Committee (June 24, 1959). *Cf. Gundaker Century Motors v. Gassert*, 23 N.J. 71, 127 A. 2d 566 (1956) app. dism. 354 U.S. 933 (1957); Note, 73 Harv. L. Rev. 729, 730-31 (1960); Johnson, The Legal Status of Church-State Relationships in the United States 265-266 (1934).

13. It may be noted that in this connection organized labor has made comparatively little headway in unionizing clerical employees. *See Brief of Retail Clerks International Association, AFL-CIO, amicus curiae*; Note, 73 Harv. L. Rev. 729, 735 (1960).

3. THE ACT OF AUGUST 10, 1959, P. L. 660, DOES NOT VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT PROHIBITS THE RETAILING ON SUNDAY OF CERTAIN COMMODITIES AND NOT OTHERS.

Decent burial was accorded Appellants' contentions on this aspect of the appeal by the opinion of Judge Hastie speaking for the statutory Court convened in *Two Guys from Harrison-Allentown, Inc., v. McGinley*, No. 36, October Term, 1960:

> "In larger context, cases arising under the Sunday closing laws are but a striking example of the continuing reluctance of the Supreme Court to interfere with even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations. *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 1955, 348 U. S. 483; *Kotch v. Board of River Port Pilot Commissioners*, 1947, 330 U. S. 552; *Tigner v. Texas*, 1940, 310 U. S. 141. But *cf. Morey v. Doud*, 1957, 354 U. S. 457. While *Morey v. Doud* indicates that the Supreme Court will still strike down what it views as the most patently arbitrary of economic classifications we cannot ignore the fact that no Sunday law has seemed to the Court to raise even a substantial question in this area.
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> "Moreover, in the case of the 1959 amendment of the Pennsylvania law, the circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action. In the present record it appears and we find that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that of the

plaintiff initiated and triggered new and rather large scale violations, and threats of others. It also appears in the testimony which is part of the legislative hearing on the bill which became the 1959 amendment of the Sunday closing law, that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute. It is probable that such considerations influenced the legislature's 1959 decision to make Sunday retail selling the subject of a new prohibitory enactment. In such circumstances we find it impossible to believe that the Supreme Court would treat this case as significantly different from those in which it has dismissed appeals for want of a substantial federal question." (Rec. 283-284; 179 F. Supp. 944, 952 (E. D. Pa. 1959).)

Appellants in the present case have abandoned all efforts to maintain their position that the Pennsylvania Act of August 10, 1959, P. L. 660, is "arbitrarily selective" in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Instead, they have elected to rely upon the brief to be filed on behalf of the appellant in the *Two Guys* case. Under these circumstances, appellees Thomas J. Gibbons and Victor H. Blanc will not attempt anticipatory argument here, but request permission to file a further brief, if necessary, to meet the presentation on this issue which will be made by the appellant in *Two Guys*.

IV.

CONCLUSION

For the foregoing reasons, enforcement of the Pennsylvania Sunday Closing Law now before this Court will violate neither the First nor the Fourteenth Amendments to the Constitution of the United States and hence Appellees pray this Court to affirm the final order of the court below dismissing Appellants' amended complaint.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1960.

Abraham Braunfeld, et al., Appellants, v. Albert N. Brown, Commissioner of Police of the City of Philadelphia, Pennsylvania, et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[May 29, 1961.]

Mr. Chief Justice Warren announced the judgment of the Court and an opinion in which Mr. Justice Black, Mr. Justice Clark, and Mr. Justice Whittaker concur.

This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute,[1] enacted in 1959, which proscribes the Sunday

[1] 18 Purdon's Pa. Stat. Ann. § 4699.10 provides:

"Selling certain personal property on Sunday

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense.

"Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter."

retail sale of certain enumerated commodities. Among the questions presented are whether the statute is a law respecting an establishment of religion and whether the statute violates equal protection. Since both of these questions, in reference to this very statute, have already been answered in the negative, *Two Guys from Harrison-Allentown, Inc., v. McGinley*, — U. S. —, and since appellants present nothing new regarding them, they need not be considered here. Thus, the only question for consideration is whether the statute interferes with the free exercise of appellants' religion.

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They instituted a suit in the court below seeking a permanent injunction against the enforcement of the 1959 statute. Their complaint, as amended, alleged that appellants had previously kept their places of business open on Sunday; that each of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday; that Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment; that the statute is unconstitutional for the reasons stated above.

A three-judge court was properly convened and it dismissed the complaint on the authority of the *Two Guys From Harrison* case, 184 F. Supp. 352. On appeal brought under 28 U. S. C. § 1253, we noted probable jurisdiction, 362 U. S. 987.

Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath. Appellants also assert that the statute will operate so as to hinder the Orthodox Jewish faith in gaining new adherents. And the corollary to these arguments is that if the free exercise of appellants' religion is impeded, that religion is being subjected to discriminatory treatment by the State.

In *McGowan* v. *Maryland*, — U. S. —, —, we noted the significance that this Court has attributed to the development of religious freedom in Virginia in determining the scope of the First Amendment's protection. We observed that when Virginia passed its Declaration of Rights in 1776, providing that "all men are equally entitled to the free exercise of religion," Virginia repealed its laws which in any way penalized "maintaining any opinions in matters of religion, forebearing to repair to church, or the exercising any mode of worship whatsoever." But, Virginia retained its laws prohibiting Sunday labor.

We also took cognizance, in *McGowan*, of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquillity, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six

days of the week. We reviewed the still growing state preoccupation with improving the health, safety, morals and general well-being of our citizens.

Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate; and appellants point out that their religion requires them to refrain from work on Saturday as well. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.

Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Reynolds* v. *United States*, 98 U. S. 145, 166. Thus, in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But, this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell* v. *Connecticut*, *supra*, at pp. 303–304, 306. As pointed out in *Reynolds* v. *United States*, *supra*, at p. 164, legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of impor-

tant social duties or subversive of good order, even when the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:

> "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that *the legislative powers of the government reach actions only, and not opinions*, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties.*" (Emphasis added.) 8 Works of Thomas Jefferson 113.[2]

And, in the *Barnette* case, the Court was careful to point out that "the freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. . . . It

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[2] Oliver Ellsworth, a member of the Constitutional Convention and later Chief Justice, wrote:

"But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; because the open *practice* of these is of evil example and detriment." (Emphasis added.) Written in the Connecticut Courant, Dec. 17, 1787, as quoted in 1 Stokes, Church and State in the United States, 535.

is . . . to be noted that the compulsory flag salute and pledge requires *affirmation of a belief* and an *attitude of mind*." 319 U. S., at 630, 633. (Emphasis added.)

Thus, in *Reynolds* v. *United States*, this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. And, in *Prince* v. *Massachusetts*, 321 U. S. 158, this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.

It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, *id.*, at 165, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as

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See the concurring opinion of Mr. Justice Cardozo, joined by Mr. Justice Brandeis and Mr. Justice Stone, in *Hamilton* v. *Regents*, 293 U. S. 245, 265–268.

forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i. e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires his to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches, for 1958, 257 *et seq.* Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic dis-

advantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. See *Cantwell* v. *Connecticut, supra*, at pp. 304–305.[4]

As we pointed out in *McGowan* v. *Maryland, supra*, at pp. ——, we cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquillity—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day in which people may visit friends and relatives who are not available during working days, a day when the weekly

[4] Thus in cases like *Murdock* v. *Pennsylvania*, 319 U. S. 105 and *Follett* v. *McCormick*, 321 U. S. 573, this Court struck down municipal ordinances which, in application, required religious colporteurs to pay a license tax as a condition to the pursuit of their activities because the State's interest, the obtaining of revenue, could be easily satisfied by imposing this tax on nonreligious sources.

laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation.

Also, in *McGowan*, we examined several suggested alternative means by which it was argued that the State might accomplish its secular goals without even remotely or incidentally affecting religious freedom: — U. S., at —. We found there that a State might well find that those alternatives would not accomplish bringing about a general day of rest. We need not examine them again here.

However, appellants advance yet another means at the State's disposal which they would find unobjectionable. They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. By such regulation, appellants contend, the economic disadvantages imposed by the present system would be removed and the State's interest in having all people rest one day would be satisfied.

A number of States provide such an exemption,[5] and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest

[5] *E. g.*, Ind. Ann. Stat. § 10-4301.

on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day;[6] this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs,[7] a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs,[8] a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring.[9] For all of these reasons, we cannot say

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[6] "If he [the Orthodox Jewish storekeeper] opens on Saturday, he is subjected to very fierce competition indeed from Christian shopkeepers, whereas on Sunday, supposing he closes on Saturday, he has an absolutely free run and no competition from Christian shopkeepers at all." 311 Parliamentary Debates, Commons, 492

"It is true that the orthodox Jew will only be allowed to trade until two o'clock on Sunday, but during that time he will have a monopoly. That is a tremendous advantage. In many districts he will be the only trader with a shop open in that district." 101 Parliamentary Debates, Lords, 430.

[7] Connecticut, which has such an exemption statute, requires that Sabbatarians, in order to qualify, file a written notice of religious belief with the prosecuting attorney. Conn. Gen. Stat. Rev. § 53-303.

[8] *E. g.*, Va. Code Ann., § 18.1-359.

[9] *E. g.*, 43 Purdon's Pa. Stat. Ann., §§ 951-963.

that the Pennsylvania statute before us is invalid, either on its face or as applied.

MR. JUSTICE HARLAN concurs in the judgment. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur in our disposition of appellants' claims under the Establishment Clause and the Equal Protection Clause. MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN have rejected appellants' claim under the Free Exercise Clause in a separate opinion.

Accordingly, the decision is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1960.

Abraham Braunfeld, et al., Appellants, v. Albert N. Brown, Commissioner of Police of the City of Philadelphia, Pennsylvania, et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[May 29, 1961.]

Mr. Justice Brennan, concurring and dissenting.

I agree with The Chief Justice that there is no merit in appellants' establishment and equal-protection claims. I dissent, however, as to the claim that Pennsylvania has prohibited the free exercise of appellants' religion.

The Court has demonstrated the public need for a weekly surcease from worldly labor, and set forth the considerations of convenience which have led the State of Pennsylvania to fix Sunday as the time for that respite. I would approach this case differently, from the point of view of the individuals whose liberty is—concededly—curtailed by these enactments. For the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.

The appellants are small retail merchants, faithful practitioners of the Orthodox Jewish faith. They allege—and the allegation must be taken as true, since the case comes to us on a motion to dismiss the complaint—that ". . . one who does not observe the Sabbath [by refraining from labor] . . . cannot be an Orthodox Jew." In appellants' business area Friday night and Saturday are busy times; yet appellants, true to their faith, close

during the Jewish Sabbath, and make up some, but not all, of the business thus lost by opening on Sunday. "Each of the plaintiffs," the complaint continues, "does a substantial amount of business of Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sundays." Consequences even more drastic are alleged: "Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment." In other words, the issue in this case—and we do not understand either appellees or the Court to contend otherwise—is whether a State may put an individual to a choice between his business and his religion. The Court today holds that it may. But I dissent, believing that such a law prohibits the free exercise of religion.

The first question to be resolved, however, is somewhat broader than the facts of this case. That question concerns the appropriate standard of constitutional adjudication in cases in which a statute is assertedly in conflict with the First Amendment, whether that limitation applies of its own force, or as absorbed through the less definite words of the Fourteenth Amendment. The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end. Nor is the case decided by a finding that the State's interest is substantial and important, as well as rationally justifiable. This canon of adjudication was clearly stated by Mr. Justice Jackson, speaking for the Court in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943):

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own

sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

This exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society. See, *e. g.*, *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Jones* v. *City of Opelika*, 319 U. S. 103 (1943); *Martin* v. *City of Struthers*, 319 U. S. 141 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944); *Marsh* v. *Alabama*, 326 U. S. 501, 510 (1946). Even the most concentrated and fully articulated attack on this high standard has seemingly admitted its validity in principle, while deploring some incidental phraseology. See *Kovacs* v. *Cooper*, 336 U. S. 77, 89, 95–96 (1949) (concurring opin-

ion); but cf. *Ullmann* v. *United States*, 350 U. S. 422 (1956). The honored place of religious freedom in our constitutional hierarchy, suggested long ago by the argument of counsel in *Permoli* v. *Municipality No. 1 of the City of New Orleans*, 3 How. 589, 600 (1845), and foreshadowed by a prescient footnote in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938), must now be taken to be settled. Or at least so it appeared until today. For in this case the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose.

Admittedly, these laws do not compel overt affirmation of a repugnant belief, as in *Barnette*, nor do they prohibit outright any of appellants' religious practices, as did the federal law upheld in *Reynolds* v. *United States*, 98 U. S. 145 (1878), cited by the Court. That is, the laws do not say that appellants must work on Saturday. But their effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage. Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. This clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature. And yet, such a tax, when applied in the form of an excise or license fee, was held invalid in *Follett* v. *Town of McCormick*, *supra*. All this the Court, as I read its opinion, concedes.

What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justi-

fies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds*, for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State's traditional protection of children, as in *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), for appellants are reasoning and fully autonomous adults. It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

It is true, I suppose, that the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind.[1] We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's. Even England, not under the compulsion of a written constitution, but simply influenced by con-

[1] Conn. Gen. Stat., 1958 rev., § 53-303; Fla. Laws 1959, c. 59-1650, § 2; Ill. Rev. Stat., 1959, c. 38, § 549; Burns' Ind. Ann. Stat., 1956 repl., § 10-4301; Kan. Gen. Stat. Ann., 1949, § 21-953; Ky. Rev. Stat., 1959, § 436.160 (2); Me. Rev. Stat., 1954, c. 134, § 44; Mass. Gen. Laws Ann., 1958, c. 136, § 6; Mich. Stat. Ann., 1957 rev., §§ 18.855, 18.122, 9.2702; Mo. Rev. Stat., 1953, § 563.700; Neb. Rev. Stat., 1943, § 28-940; N. J. Stat. Ann., 1953, § 2A:171-4; McKinney's N. Y. Laws, Penal Law § 2144; N. D. Rev. Code 1943, § 12-2117; Page's Ohio Gen. Code Ann., 1954, § 13045; Okla. Stat. Ann., 1958, Tit. 21, § 909; R. I. Gen. Laws, 1956, § 11-40-4; S. D. Code, 1939, § 13.1710; Tex. Pen. Code § 284; Va. Code, 1950, § 18.1-359; Wash. Rev. Code, 1959, § 9.76.020; W. Va. Code Ann., 1955, c. 61, Art. 8, § 6073. Cf. Wis. Stat. Ann., 1958, § 301.33.

siderations of fairness, has such an exemption for some activities.[2] The Court conjures up several difficulties with such a system which seem to me more fanciful than real. Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors (another example of the exemption technique) was rejected with the observation that "its unsoundness is too apparent to require" discussion. *Selective Draft Law Cases*, 245 U. S. 366, 390 (1918). However widespread the complaint, it is legally baseless, and the State's reliance upon it cannot withstand a First Amendment claim. We are told that an official inquiry into the good faith with which religious beliefs are held might be itself unconstitutional. But this Court indicated otherwise in *United States* v. *Ballard*, 322 U. S. 78 (1944). Such an inquiry is no more an infringement of religious freedom than the requirement imposed by the Court itself in *McGowan* v. *Maryland*, *ante*, p. —, decided this day, that a plaintiff show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause of the First Amendment.[3] Finally, I find the Court's mention of a problem under state anti-discrimination statutes almost chimerical. Most such statutes provide that hiring may be made on a religious basis if religion is a *bona fide* occupational qualification. It happens, moreover, that Pennsylvania's statute has such a provision.[4]

In fine, the Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the

[2] *E. g.*, Shops Act, 1950, 14 Geo. VI, c. 28, § 53.

[3] *E. g.*, Mass. Gen. Laws Ann., 1958, c. 151B, § 4 (1).

[4] 43 Purdon's Pa. Stat. Ann., § 955.

effect on religion, though substantial, is indirect. The Court forgets, I think, a warning uttered during the congressional discussion of the First Amendment itself: ". . . the rights of conscience are in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."[1]

I would reverse this judgment and remand for a trial of appellants' allegations, limited to the free-exercise-of-religion issue.

[1] 1 Annals of Cong. 730 (remarks of Representative Daniel Carroll of Maryland, August 15, 1789).

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Mr. Justice Stewart, dissenting.

I agree with substantially all that Mr. Justice Brennan has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.